Supreme Court, U.S.
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No. 04-

In The
Supreme Court of the United States

GARY L. GILLETTE, D.V.M.,

Petitioner,

v.

MARCIA V. STUCKI,

Respondent.

On Petition for a Writ of Certiorari to the Michigan Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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Petitioner, *In pro per*
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QUESTIONS PRESENTED

This Petition raises serious constitutional questions regarding a state appellate court's actions while addressing a property rights (land use) dispute that resulted in nine separate appeals being taken during the past ten years. While the land use issues are still important, they are secondary to the constitutional issues that are now extant in this case.

The US Constitution, 14th Amendment, and the Michigan Constitution, Const 1963 art I, §§ 2 & 17, prohibit the State of Michigan from depriving any person of life, liberty, or property without due process of law, and from denying to any person within its jurisdiction the equal protection of the laws.

I. Did the Michigan Court of Appeals, itself, unlawfully deprive Petitioner of his due process and equal protection rights by, *inter alia*, (i) arbitrarily ignoring its own (and the State Supreme Court's) very recent, first-impression, directly on-point, and binding case law decisions with respect to the dispositive issues in this dispute; (ii) rendering the Legislative intent section of the controlling state statue surplusage and nugatory by arbitrarily ignoring it while impermissibly construing it, and did that action also violate the separation of powers clause in Const 1963, art III, § 2; (iii) rendering two obligatory court rules applicable solely to the appellate court surplusage and nugatory by arbitrarily ignoring them as well; and (iv) treating the litigants (abutting property owners) in a clearly disparate manner with respect to almost identical land use requests that each sought, with those requests being separated by only three years in time?

PARTIES TO THE PROCEEDING

The parties are set forth in the caption.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, on behalf of himself and all similarly situated persons in the State of Michigan and the other 49 states, respectfully petitions for a writ of certiorari to review the judgment of the Michigan Court of Appeals in this case.

OPINIONS AND ORDERS BELOW

This petition relates to only one (*Gillette v Stucki*) of the two cases that were decided in the lower courts. These cases, while bearing separate case numbers at all times below, were nonetheless consolidated for purposes of final decision and final appellate review. The second case, *Gillette v Comstock Township*, is not being pursued in this Court.

The initial (unpublished) trial court decision was issued on May 5, 1997 (App. 42a), with an interlocutory judgment entered on December 23, 1997 (App. 47a). The final (unpublished) trial court decision and order was entered on February 26, 2002. App. 25a. The consolidated (and unpublished) decision of the Michigan Court of Appeals was entered on February 3, 2004. App. 5a. [1]

JURISDICTION

The opinion and judgment of the Michigan Court of Appeals was entered on February 3, 2004. App. 5a. A timely motion for rehearing of that decision was denied on March 12, 2004. App. 4a. A single Application for Leave to Appeal in both cases, with the component cases subsequently being assigned separate docket numbers, was filed in the Michigan

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[1] A number of additional trial and appellate court orders that are also relevant to this Petition have been reproduced and appended, and they will be referenced and discussed at the appropriate point, *infra*.

Supreme Court on April 23, 2004. The Court denied leave to appeal in both cases, by separate orders, each entered on October 25, 2004. App. 2a and 3a. On November 12, 2004, Petitioner filed a timely motion for reconsideration in the *Gillette v Stucki* case only. App. 145-146a. That motion was denied on February 28, 2005. App. 1a. [2]

This Petition, which relates to *Gillette v Stucki* only, is timely under this Court's Rule 13(3), *United States v Ibarra*, 502 US 1, 4-7 (1991), and *Young v Harper*, 520 US 143, 147, n 1 (1997). This Court's jurisdiction is invoked pursuant to 28 USC § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND COURT RULES INVOLVED

Because they are lengthy, the relevant constitutional provisions, statutes, ordinances and court rules involved have been reproduced at App. 96-111a. These include, most importantly:

- US Constitution, 14th Amendment, § 1;
- Mich Const 1963, art I, §§ 2 & 17; art III, § 2; and art VI, § 28;
- Michigan Compiled Laws (MCL) 125.286e;
- Comstock Township Zoning Ordinance §§ 4.13(a); 4.13(c)(2)(c); and 22.01.2(c); and
- Michigan Court Rules (MCR) 1.103, 2.604(A), 7.215(B)(1)(2)(3)(7), 7.215(C)(2), and 7.215(J)(1).[3]

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[2] The Court's order, by listing both cases in the caption section, and by then using the plural "orders" in the text section, erroneously suggests that Petitioner moved for reconsideration in both cases. This is not correct. See App. 145-146a.

[3] Current versions of the Michigan Court Rules can be found at http://courtofappeals.mijud.net/rules/public/default.asp. Current versions of the Michigan Constitution and the Michigan Compiled Laws can be found at http://legislature.mi.gov.

STATEMENT OF THE CASE

A. Introduction and Overview

This is a property rights (land use) dispute that has been litigated for almost ten years, with nine separate appeals being taken in the lower courts. This dispute would have ended very quickly, however, and at a minimal cost to everyone involved, had the lower courts simply enforced--as each was required to do--the unambiguous statutes and ordinances that continue to control this case, but which those courts have repeatedly ignored and refused to enforce.

The inciting incident was an agency decision granting Respondent Stucki permission to establish a full-blown livestock-keeping and breeding operation (a "farmstead," as Stucki calls it) on her 34.6 acre, single-family, residentially-zoned property, by special exception use permit approval. [4] At first blush, and despite the large number of livestock approved, this might not appear to be an unreasonable (or unlawful) approval given the size of Stucki's property. [5] That was not, however, the totality of the approval.

Rather, the approval also permits Stucki to keep, graze, and house this entire menagerie of livestock a mere *80 feet* from Petitioner's single-family, residentially-zoned, master bedroom window, in contravention of the 275-375 foot zoning ordinance-mandated setback requirements. More importantly, Stucki was granted these approvals (which she immediately established in part) without ever submitting or

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[4] The approval permits Stucki to keep 92 head of adult livestock, including 10 adult pigs, 10 adult cattle, 10 adult sheep, 10 adult goats, 12 adult horses, 25 adult poultry (all species included), and 15 adult rabbits, with no restrictions being placed on the number of juveniles of these species that Stucki could also keep once these adults started reproducing.

[5] An acre contains 43,560 square feet of land, in whatever shape. *Black's Law Dictionary*, 6th Ed, p 25 (1991). As such, Stucki's 34.6 acre parcel encompasses 1,507,176 square feet of land.

receiving approval for a site plan conclusively proving that her proposed livestock-keeping uses complied with the ordinance-mandated setbacks, as required by state statute, the zoning ordinance, and well settled case law.

While the above-described land use approval is facially absurd, especially in view of the abrogation of the ordinance-mandated setback requirements, that approval is no longer the primary issue. Rather, the primary issue is the unlawful denial of Petitioner's constitutionally protected due process, equal protection, and personal property rights by the Michigan judicial (and quasi-judicial) system, which actions the Michigan Supreme Court--as gate-keeper of the state's legal system--declined (or refused) to address and correct.

As shown below, instead of enforcing the un-ambiguous legislative intent section of the statute that controlled the outcome in this dispute, as it was required to do, the appellate court rendered it surplusage and nugatory by arbitrarily ignoring it while impermissibly construing the statute. By doing that, the appellate court rewrote the statute from the bench, thereby violating the separation of powers clause in the Michigan Constitution. The appellate court also arbitrarily ignored two very recent, first-impression, directly on-point, and binding case law decisions of both that court and the Michigan Supreme Court on the dispositive issues, thereby creating conflicts with those cases, overruling them, or rendering them surplusage and nugatory. The finale' occurred when the appellate court rendered two obligatory court rules applying to it, specifically, surplusage and nugatory by arbitrarily ignoring them as well.

Petitioner will also demonstrate that Respondent Stucki's positions and arguments in 1995 with respect to her own land use requests constitute the epitome of hypocrisy, as well as a request for--and a grant of--unequal treatment under the identical law she relied on in successfully opposing a very similar land use request on directly abutting property just three years earlier.

B. The Administrative Agency Proceedings [6]

On July 12, 1995, Respondent Marcia V. Stucki (Stucki) filed a single Special Exception Use Permit (SEUP) application with the Comstock Township Planning Commission (Planning Commission), by which she sought to keep horses, chickens, goats, and other unspecified livestock on her single-family, residentially-zoned property. App. 6a. In a written declaration filed simultaneously with her SEUP application, Stucki unequivocally stated: "The Applicant filed this Application for Special Use Exception [sic] to formally establish her right to keep horses/private stables and raise and keep farm animals, such as poultry and goats." App. 127a. [7]

A public hearing was held on July 27, 1995. While testifying in opposition to Stucki's SEUP requests, Petitioner repeatedly and affirmatively warned the Planning Commission that SEUP proposals are subject to site plan submission, review and approval requirements, and that Stucki's SEUP requests--as she proposed to create them--did not comply with the ordinance-mandated setback requirements, which defect would be obvious when the required site plan was proffered. App. 57-59a. See also App 147-149a.

On August 10, 1995, the Planning Commission granted Stucki's private stable SEUP request, which authorized her to keep 12 adult horses, with no restrictions placed on the number of juvenile horses she could also keep. App. 7a & 27a. A site plan, as required by state statute and the Township's zoning

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[6] Since the dispositive issues in this case are questions of pure law for which only a handful of Record facts are required--including, most importantly, Stucki's admissions to the allegations in the Petition For Injunctive Relief, Damages, and Attorney Fees--Petitioner has confined this statement to those facts, pursuant to this Court's Rule 14.1(g).

[7] See also App. 27a, first incomplete ¶ and App. 51a, third full ¶, where this same fact was reiterated by both the trial court and Stucki. Several critical and highly relevant facts (this one being a representative example) are missing from the appellate decision.

ordinance, was not submitted, reviewed, and approved before final SEUP approval was granted. The required site plan is not, therefore, part of the Record in this case, which Stucki admits. Stucki nonetheless immediately established, and has continuously maintained since August 10, 1995, the private stable SEUP use she was granted. App. 129a (Petition for Injunctive Relief, Damages and Attorney Fees, ¶ 4, 5, & 22), and App. 140a, same paragraphs (Stucki's admissions thereto).

On October 12, 1995, the Planning Commission granted Stucki's "other livestock" SEUP request, authorizing her to keep 25 adult poultry (any and all species); 15 adult rabbits; and 10 adults each of pigs, cattle, sheep, and goats. No restrictions were placed on the number of juveniles of each of these species Stucki could also keep, and private stable setbacks, rather than the substantially more restrictive "livestock-keeping" setbacks mandated by the zoning ordinance, were imposed "by condition". App. 8a, last ¶; 27a, 1st full ¶; & 77a, 3rd ¶. A site plan, as required by state statute and the Township's zoning ordinance, was not submitted, reviewed, and approved before final approval was granted for Stucki's "other livestock" SEUP request. The required site plan is not, therefore, part of the Record in this case, which Stucki admits. Stucki nonetheless immediately established (in part), and has continuously maintained since October 12, 1995, the "other livestock" SEUP use she was granted. App. 27a, last ¶, last sentence; App. 129a, ¶ 6 & 22 & 140a, same paragraphs.

C. The Initial Circuit Court Proceedings

On November 13, 1995, Petitioner, acting in pro per, appealed Stucki's final SEUP approvals in the circuit court. App. 9a. Simultaneous with the appeal, Petitioner also filed several motions, including one for peremptory reversal grounded on the statutory and ordinance violations set forth above, i.e., Stucki's failure to obtain site plan review and approval before receiving final approval for, and before then

immediately creating, her proposed SEUP uses. An order reflecting the court's decisions on these motions was entered on March 13, 1996. App. 80a.

On August 29, 1996--and pursuant to point 8 of the court's March 13, 1996 order (App. 81a)--Petitioner, by counsel, filed a Petition for Injunctive Relief, Damages and Attorney Fees. App. 129a. This petition was, once again, grounded in statutory and ordinance-defined nuisance per se.

On October 9, 1996, the Township filed a motion to dismiss the petition, which Stucki subsequently joined. A judge/attorney conference was held in chambers on October 18, 1996, with no record made. On December 5, 1996, a stipulated Order for Preliminary Injunction, Scheduling, and Other Matters resulting from this conference was entered. The order, *inter alia*, (1) formally enjoined Stucki from expanding her livestock keeping activities beyond the level that existed on 12/8/95 until further order of the court; (2) expressly postponed a decision on Petitioner's petition (and the motion to dismiss it) until after the court ruled on the appeal; and (3) set forth the briefing schedule for the appeal. App. 83a.

On May 5, 1997 the court rendered its decision on the appeal. The court affirmed the Planning Commission's grant of SEUP approval to Stucki, as well as the ZBA's decisions related thereto. App. 42a. With respect to the site plan requirement issue Petitioner raised, the court--relying solely on the Township's zoning ordinance--held that site plan submission, review and approval was required (but had not been done), and that a site plan would have to be submitted and approved "Before any of the animals permitted to use the property are permitted to be on the property..." App. 45-46a.

When a dispute arose concerning the language used in drafting the judgment--said dispute being squarely focused on the effect of the court's site plan decision on Stucki's existing livestock--the court requested the parties to file written objections and responses, which they did. On December 23, 1997, without ever addressing those objections and responses,

the court instead entered Stucki's proposed judgment, as initially drafted. App. 47a. The judgment addressed the appeal only. It did not decide the nuisance per se, permanent injunctive relief, and damage claims raised in Petitioner's petition, nor the motion to dismiss that petition. Nor did the judgment resolve the dispute over the effect of the court's site plan decision on Stucki's existing livestock either.

D. Interlocutory Appellate And Further Circuit Court Proceedings

On January 13, 1998, Petitioner filed an Application for Leave to Appeal the December 23, 1997 interlocutory judgment in the Court of Appeals. On that same date, the Township noticed for hearing its previously-filed motion to dismiss the Petition for Injunctive Relief and Damages, which Stucki joined. A hearing was held on February 16, 1998, and on April 29, 1998, the court entered an opinion and order denying the motion. The court expressly reserved its decision on the Petition (and the motion to dismiss it) until after the Court of Appeals acted on the appeal. App. 85-86a.

On May 20, 1998, Stucki answered the petition. In doing so, she admitted that a site plan had never been submitted, reviewed or approved before both of the SEUP uses she sought were granted and established. App. 142a, ¶ 22.

The Court of Appeals did not grant leave to appeal or rehearing (App. 87-88a), nor did the Michigan Supreme Court on further appeal (App. 89-90a). When the case resumed in the trial court for further proceedings consistent with the last order entered (App. 85a), Judge Foley had retired, so the case was reassigned to Judge Philip D. Schaefer. App. 11a, last ¶ & n 5.

Immediately after the trial court proceedings resumed in early September of 1999, the Respondents "renewed" their previously denied (App. 85a) motion to dismiss Petitioner's petition. Before the hearing on this "renewed" motion began, an agreement to dismiss the Township, only, from this case

was reached, with a stipulated dismissal order being entered on December 28, 1999. App. 91a

Judge Schaefer did not decide Stucki's "renewed motion to dismiss" after the October 11, 1999 hearing was concluded. Instead, he scheduled a status conference. Shortly thereafter, on November 4, 1999, Petitioner filed a motion for summary disposition on his petition, with a hearing date subsequently scheduled for 1-31-00. App. 150a. In the face of Petitioner's summary disposition motion, and the scheduled 1-31-00 hearing on the same, Stucki filed--on January 19, 2000--a request for site plan review and approval with the Planning Commission, i.e., for the two SEUP approvals she had received final approval for in 1995. Despite Petitioner's (and his attorney's) numerous objections during Stucki's site plan review and approval proceeding--including that the entire proceeding was *void ab initio*--Stucki's site plan was approved by the Planning Commission, on 2-10-00. App. 28a, last ¶.

E. Petitioner's Additional Circuit Court Actions And The Final Circuit Court Proceedings

The approval of Stucki's site plan triggered two new actions by Petitioner, which were filed simultaneously on March 16, 2000. One was an appeal of Stucki's site plan approval decision, the other a three-count Complaint against the Township. App. 11a & 29a. Since the latter case is not being pursued in this Court, it will not be discussed further.

On March 26, 2001, Petitioner voluntarily dismissed the newly-filed appeal, without prejudice. App. 151a. Pursuant to a scheduling order it entered on April 5, 2001, the court heard cross motions for summary disposition on the remaining issues in this case on July 13, 2001. App. 29a. On February 26, 2002, the court entered a joint final decision and order in both then-pending cases. In this case, the court granted summary disposition to Stucki (based on failure to state a claim), while

denying Petitioner's summary disposition motion (no genuine issue as to any material fact). App 41a. [8]

F. The Final Appellate Proceedings

On March 19, 2002, Petitioner filed a Claim of Appeal (from the 2-26-02 final decision), plus an Application for Leave to Appeal (from the 12-23-97 interlocutory decision), plus a motion to consolidate. The Application was dismissed by the Chief Judge on 4-8-02. App. 93a. Petitioner moved for rehearing by a full panel, which was denied on 5-29-02. App. 94a. Petitioner appealed those decisions to the Supreme Court, which appeal it denied on December 30, 2002. App. 95a.

In the Claim of Appeal, the Court of Appeals affirmed the trial court's grant of summary disposition to Stucki. App. 5a & 24a. Petitioner moved for rehearing, which was denied on 3-12-04. App. 4a. Petitioner then sought Leave to Appeal in the Michigan Supreme Court, which was denied on October 25, 2004. App. 3a. Petitioner then moved for reconsideration, which was denied on February 28, 2005. App. 1a. [9]

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[8] As his opinion clearly reflects, Judge Schaefer re-decided the site plan requirement issue that Judge Foley decided in the initial (1995) appeal, with those decisions being 180 degrees apart. App. 37-41a & 45-46a. By affirming all prior orders entered in this case (App. 41a, last ¶), including Judge Foley's contrary site plan decision in 1997, Judge Schaefer created a huge conundrum, i.e., there are now two diametrically-opposed decisions...by two different circuit court judges...in the same judicial circuit...on the identical (and clearly dispositive) issue...with two different results...both being affirmed by the Court of Appeals...in this case.

[9] To comply with this Court's Rule 14.1(g)(i), Petitioner has appended the pertinent pages of his Motion for Rehearing of Opinion Dated February 3, 2004 in the Court of Appeals; his Application For Leave to Appeal in the Michigan Supreme Court (dated 4-23-04); and his Motion for Reconsideration of Order Denying Leave to Appeal (dated 11-12-04), wherein the constitutional rights deprivations presently at issue were squarely raised, but never addressed by those courts. See App. 112-113a, 114-119a, and 119-126a, respectively.

REASONS FOR GRANTING THE PETITION

I. The Michigan Court Of Appeals, Itself, Unlawfully Deprived Petitioner Of His Due Process And Equal Protection Rights By, *inter alia*, (i) Arbitrarily Ignoring Its Own (And The State Supreme Court's) Very Recent, First-Impression, Directly On-Point, And Binding Case Law Decisions With Respect To The Dispositive Issues In This Dispute; (ii) Rendering The Legislative Intent Section Of The Controlling State Statue Surplusage And Nugatory By Arbitrarily Ignoring It While Impermissibly Construing It, Which Action Also Violated The Separation Of Powers Clause In Const 1963, Art III, § 2; (iii) Rendering Two Obligatory Court Rules Applicable Solely To The Appellate Court Surplusage And Nugatory By Arbitrarily Ignoring Them As Well; And (iv) Treating The Litigants (Abutting Property Owners) In A Clearly Disparate Manner With Respect To Almost Identical Land Use Requests That Each Sought, With Those Requests Being Separated By Only Three Years In Time

A. The Dispositive Issues In This Dispute

In his Amended Motion For Summary Disposition (App. 152a, point 1), Petitioner clearly framed one of the dispositive issues in this case as follows:

> There is no genuine issue of material fact that--pursuant to the Township Rural Zoning Act (TRZA), which has been incorporated verbatim in Comstock Township's Zoning Ordinance--site plan submission, review, and approval was mandatory **BEFORE** the Planning Commission could lawfully grant final approval for Defendant Stucki's special exception use permit requests in

> 1995. Nor is there a genuine issue of material fact that Stucki failed to comply with the Act's site plan requirements. (emphasis in original) [10]

The trial court framed the issue similarly (App. 37a, first paragraph under File D95-3152-AA, Gillette v Stucki):

> Reduced to its lowest common denominator, the central issue raised by the volumes of paperwork accompanying these motions is quite simple, namely, whether approval of a site plan must be given **before** SEUP approval. Plaintiff answers in the affirmative; everyone else answers in the negative. (emphasis in original) [11]

The Court of Appeals, however, stated the question as follows (App. 17a, first paragraph under Docket No. 240199):

> Plaintiff asserts that he was entitled to summary disposition because the township violated Michigan law by failing to conduct site plan review for a special exception use *before making a determination of whether the proposed location was suitable for the use*. We disagree. [emphasis added by Petitioner]

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[10] See ¶ 1-22 in the Petition For Injunctive Relief, Damages and Attorney Fees–and Stucki's admissions thereto (App. 129a-144a, ¶ 4, 5, 6, & 22 in particular)–for the origin of this dispositive issue.

[11] Contrary to Judge Schaefer's conclusion, Petitioner was not the only one who answered this question in the affirmative. So did Judge Foley in the underlying appeal (App. 45-46a), which decision Judge Schaefer then affirmed (App. 41a, last full ¶, last sentence), which the Court of Appeals also affirmed by affirming Judge Schaefer's final decision (App. 5a & 24a), all of which creates the conundrum Petitioner described on p 10, n 8, *supra*.

Clearly, the appellate panel's version of this dispositive issue is not, even remotely, close to the trial court's version--nor to Petitioner's framing of the issue in the trial court--nor to Petitioner's framing of the issue in his Brief on Appeal either. See App. 156-160a, Questions For Review, Nos. 3 & 6.

As should also be apparent, resolution of the dispositive question turns on the answer to a fundamental (and critical) threshold question, namely, "When does a SEUP decision become final?" or, alternatively, "Does a site plan approval decision constitute the final decision with respect to a proposed land use, including a SEUP use?" Both of these questions have been definitively answered by Michigan's appellate courts, which answers all of the courts below arbitrarily ignored.

B. The Very Recent, First-Impression, Directly On-Point, And Binding Case Law Decisions The Court Of Appeals Arbitrarily Ignored

The appellate panel correctly noted that Stucki's SEUP requests were granted on August 10, 1995 (App. 7a, 2nd full ¶) and October 12, 1995 (App. 8a, last ¶), while the required site plan for those uses was submitted and approved more than four years later, on February 10, 2000 (not 2002 as the opinion initially stated; App. 10a, last ¶ & 11a, 1st ¶). After so noting, and after construing selected portions of MCL 125.286e and the Township's zoning ordinance (App. 18-22a,), the panel concluded that "Final approval of the special exception use[s] was not granted until after the site plan approval occurred, and thereafter final approval of the proposed uses[s] was accomplished." App. 23a, 1st full ¶.

In *Carleton Sportsman's Club v Exeter Township*, 217 Mich App 195; 550 NW2d 867 (1996), the Court of Appeals decided--as an issue of first impression in an interlocutory appeal--the method of appeal and standard of review that apply when, as here, a zoning ordinance does not

provide for an appeal by an aggrieved party to a ZBA from a SEUP decision made by a Township Board (or, in this case, a Planning Commission.) *Id* at 196, 200, 203-204.

As a threshold matter, the *Carleton* court held that the Township Board's decision to *deny* the Sportsman's Club's SEUP request was the final decision in the matter, which final decision could be appealed to the circuit court. If appealed, the circuit court is required to review the decision under the standards set forth in Const 1963, art 6, § 28. *Id* at 196, 200, 203-204. Likewise, the *grant* of Stucki's SEUP requests by the Planning Commission on August 10, 1995 and October 12, 1995 were the final decisions with respect to her proposed SEUP uses. The final decision was not the approval of the required (but grossly ex post facto) site plan for those proposed SEUP uses four and one-half years later, as the appellate panel erroneously concluded. [12]

All of the courts below, including the Court of Appeals, arbitrarily refused to apply *Carleton's* first-impression and directly on-point SEUP-finality holding in this case, even though Petitioner has raised this issue (and the *Carleton* case) repeatedly for nine years. All of the lower courts did likewise with respect to the first-impression, appellate review standard enunciated by *Carleton*. While this latter issue was not addressed or decided by any of the courts below, it was preserved for review through the final state appeal because Petitioner raised it repeatedly and consistently. As such, that issue is also preserved for this Court's review. See *Peterman v Dep't of Natural Resources*, 446 Mich 177, 182-183; 521 NW2d 499 (1994) and *Nelson v*

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[12] See also *Arthur Land Co, LLC v Otsego County*, 249 Mich App 650, 665; 645 NW2d 50 (2002) and *Silver Creek Twp v Corso*, 246 Mich App 94, 98; 631 NW2d 346 (2001), both reiterating *Carleton's* finality holding. Judge E. Thomas Fitzgerald, the presiding judge during the final appeal in this case (App. 5a), was a member of the panels that decided both *Carleton* and *Arthur, supra*. *Id* at 196 & 651, respectively. Then Court of Appeals Judge Clifford Taylor (currently Chief Justice of the Michigan Supreme Court) authored *Carleton*. *Id* at 196.

Adams, 529 US 460, 469-470 (2000). [13]

Const 1963, art 6, § 28, the SEUP review standard enunciated in *Carleton*, states in pertinent part (App. 97a):

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review *shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law*; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. *** [emphasis added] [14]

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13 Petitioner raised the Standard of Review issue as the first argument in the first upward appeal he took in this case (Court of Appeals Docket No. 208923, filed on 1-13-98; See App 161-162a.) Since the 1998 appeal, Petitioner has raised this Standard of Review issue in virtually every brief he has filed in this case, including (most recently) at p 10-13 in his Brief on Appeal in the Court of Appeals (Docket No. 240199; See App. 156-157a; points 1&2); at p 2, 3, & 7 in his Motion For Rehearing in that same court; at p 25, n 22 in his Application for Leave to Appeal in the Michigan Supreme Court (Docket No. 126021); and at p 2, n 2 in his Motion For Reconsideration in that same Court. Furthermore, and despite the Court of Appeals' contrary holding (App. 93a), the 12-23-97 judgment (App. 47a) was not the final decision in this case, pursuant to the unambiguous language of MCR 2.604(A) (App. 105a), which court rule the appellate court also ignored. Rather, the final decision was entered on 2-26-02. See MCR 7.202(6)(a)(i); App. 106a.

14 The Michigan Supreme Court has noted that this two-pronged constitutional review standard is the *minimum* amount permissible, without forbidding more stringent review. *Rental Property Owner's Ass'n of Kent County v City of Grand Rapids*, 455 Mich 246, 269; 566 NW2d 514 (1997) (emphasis in original). Furthermore, the word shall "...indicates a mandatory and imperative directive" (*Burton v Reed* →

As even a cursory review of its May 5, 1997 decision in the initial appeal reveals (App. 42-46a), the circuit court never reached or applied the "authorized by law" standard, as required, which issue Petitioner squarely raised in the first upward appeal. App.162a. As such, the Court of Appeals should have either remanded the case for a new decision utilizing the correct standards of review (See *Carleton, supra* at 196-197, 203-204 and *Cooper Industries, Inc v Leatherman Tool Group, Inc*, 532 US 424, 431 (2001)), or reversed by peremptory order based on the glaring statutory violation, which is what Petitioner requested the court to do pursuant to MCR 7.211(C)(4). See App.164-165a & App. 107a. Had the court done so, this case would have ended seven years ago.

The other first-impression, directly on-point case the Court of Appeals arbitrarily ignored was *Charter Twp of Northville v Northville Public Schools*, 469 Mich 285; 666 NW2d 213 (2003). *Northville* is the only Michigan case that has expressly defined the term "site plan," and it did so by unanimous decision. *Id* at 292-293, 300-301 and 308-309. More importantly, each opinion filed in *Northville* specifically referenced MCL 125.286e(1) as support for it's conclusion that a site plan decision is not the final decision in a land use matter. The dissent (Justice Markman), concurring on this point, put it rather succinctly (*Id* at 308-309):

City Hospital Corp, 471 Mich 745, 752; 691 NW2d 424 (2005)) that "...normally creates an obligation impervious to judicial discretion." *AMTRAK v Morgan*, 536 US 101, 109 (2002). As such, Judge Foley--during the initial circuit court appeal in 1995--was required to determine whether the Planning Commission's grant of final SEUP approval to Stucki was authorized by law. "An agency's decision that is in violation of statute [or constitution], in excess of the statutory authority or jurisdiction of the agency, made upon unlawful procedures resulting in material prejudice, or is arbitrary and capricious is a decision that is *not* authorized by law and must be set aside." *City of Romulus v Dep't of Environmental Quality*, 260 Mich App 54, 64; 678 NW2d 444 (2003) (emphasis in original).

> *** Like the lead opinion, I believe that a site plan essentially comprises "the plan for everything on the property." *Ante* at 292. As the lead opinion acknowledges, a site plan reflects "what is to be undertaken on the site," *ante* at 293, and amounts to a proposal. This is supported by the description of site plans given in MCL 125.286e(1):
>
> > As used in this section, "site plan" includes the documents and drawings required by the zoning ordinance to insure that a *proposed land use or activity* is in compliance with local ordinances and state and federal statutes. [Emphasis in original; footnote omitted]
>
> Site plans thus can be reasonably understood as consisting of written and illustrative documents that set forth the proposed layout of a site and that are used to ensure compliance with local zoning regulations. *** *As the lead opinion recognizes, a "plan" is a proposal that is tentative in nature and is not, by definition, a final decision. Ante* at 292. [emphasis added]

As *Northville* makes crystal clear, a site plan (and the decision whether to approve or disapprove it) is not the final decision on a land use proposal. Rather, a site plan is a tool used by zoning authorities to insure that a proposed project--what is to be undertaken on the site--complies with local ordinances and state and federal statutes. In order for the zoning authorities to insure this compliance, the site plan must be submitted, reviewed, and approved before the tentative project to which the site plan relates and attaches is reviewed and approved--or reviewed and disapproved, which is what must occur if the site plan demonstrates that the

proposed use does not comply with the zoning ordinance requirements, or with other local, state and federal laws.

To hold, as the appellate court did here, that Stucki's 4 ½ year ex post facto site plan approval decision constitutes the "final decision" with respect to her proposed SEUP uses not only defies logic, it also directly conflicts with the decisions in both *Carleton* and *Northville*. That decision cannot possibly be sustained based on these two cases alone. As shown in the next three arguments, there are several more equally important reasons why it cannot be sustained. [15]

C. The Controlling Statutory Provision The Appellate Court Rendered Surplusage And Nugatory By Arbitrarily Ignoring It While Impermissibly Construing It, Which Action Also Violated The Separation Of Powers Clause In Const 1963, art III, § 2

Since they will arise frequently in the remainder of this Petition, Petitioner will set forth now the rules that apply to statutory construction. In *Halloran v Bahn*, 470 Mich 572, 577-578; 683 NW2d 129 (2004), the court stated (all internal citations omitted):

> An anchoring rule of jurisprudence, and the foremost rule of statutory construction, is that courts are to effect the intent of the Legislature. To do so, we begin with an examination of the

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15 *Northville* was decided on July 31, 2003, six months before oral argument occurred in the Court of Appeals. Since Petitioner's attorneys did not discover *Northville* before oral argument, it was not raised during oral argument. However, *Northville* was a major thrust in Petitioner's Motion for Rehearing of the Court of Appeals' decision, as well as in his subsequent Application for Leave to Appeal in the Michigan Supreme Court, and in his Motion for Reconsideration of that Court's denial of leave to appeal. See, e.g., App. 114-115, 120, & 122a, n 5.

> language of the statute. If the statute's language is clear and unambiguous, then we assume that the Legislature intended its plain meaning and the statute is enforced as written. A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. *** Undefined statutory terms must be given their plain and ordinary meanings, and it is proper to consult a dictionary for definitions.

Just as a court is prohibited from imposing a "contrary judicial gloss" by reading something into an unambiguous statute that the Legislature did not expressly include (*County of Wayne v Hathcock*, 471 Mich 445, 456; 684 NW2d 765 (2004)), a court must also "avoid a construction that would render any part of the statute surplusage or nugatory." *Omelenchuk v City of Warren*, 466 Mich 524, 528; 647 NW2d 493 (2002). [16]

After construing selected portions of MCL 125.286e and the Township's zoning ordinance (App. 18-22a), the appellate court concluded (App. 22a, 1st full ¶) that "There is no language in the statute or the ordinance that provides that approval of a site plan must always precede approval of the

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16 These rules are virtually identical to those applied by this Court. See, e.g., *Desert Palace, Inc v Costa*, 539 US 90, 98 (2003) and *Barnhart v Sigmon Coal Company* Inc, 534 US 438, 450 (2002) (examining the language of a statute to ascertain its plain meaning in order to enforce the legislative intent); *Dastar Corp v Twentieth Century Fox Film Corp, 539 US 23, 31 (2003)* (using a dictionary to determine plain meanings); and *Hibbs v Winn*, 542 US 88, ___ (2004) (the rule against superfluities). In Michigan, the statutory construction rules apply with equal force to construction of municipal ordinances and the Court Rules. See *Gora v City of Ferndale*, 456 Mich 704, 711; 576 NW2d 141 (1998) and *People v Phillips*, 468 Mich 583, 589; 663 NW2d 463 (2003), respectively.

proposed use." [17] Glaringly absent from both the appellate court's opinion and analysis--as well as Stucki's Brief On Appeal and her own analysis (See App. 18-19a and 166-167a, respectively)--is MCL 125.286e(1), which states (See also *Northville*, *supra* at 301, n3; 302, n2; and 308): "As used in this section, "site plan" includes the documents and drawings required by the zoning ordinance to insure that a proposed land use or activity is in compliance with local ordinances and state and federal statutes." [18]

This statute unambiguously states the Legislature's intent in requiring site plans, namely, to guarantee that a proposed land use or activity is in compliance with all laws, including the ordinance-enumerated requirements for the particular use being sought. [19] As such, this statute must be enforced as written. *Halloran* and *Desert Palace Inc*, *supra*.

A land use or activity is no longer "proposed" once the final approval is granted. Rather, it becomes a "done-deal" instantly. SEUP uses become done deals when the

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[17] MCL 125.286e (App. 98-99a) is embodied within the Township Zoning Act (MCL 125.271 *et seq*, 1943 PA 184, as amended), without which a Michigan Township is powerless to zone. See *Silver Creek Twp, supra* at 97. Since Comstock Township has incorporated the TZA verbatim in its zoning ordinance (at art 1.00, § 1.03 of said ordinance--See App. 101a), the statutory language, alone, is controlling.

[18] Use of dictionary definitions is proper to give undefined statutory terms their plain meaning. *Halloran* and *Dastar Corp*, *supra*. "Insure" means "to guarantee" (*Black's Law Dictionary*, *supra*, p 808); "comply" means "to act in accordance with" (*Id*, p 286); and "propose" means "to put forward for consideration, discussion, or adoption" (*The American Heritage Dictionary*, 2nd College Ed (1985), p 994.)

[19] The requirements (including setbacks) for a SEUP use must be found in the zoning ordinance, and a SEUP use, unlike a variance, does not involve the varying of those requirements but, rather, strict compliance with those requirements. *Mitchell v Grewal*, 338 Mich 81, 89; 61 NW2d 3 (1953) and *Room & Board Homes v Detroit Mayor*, 67 Mich App 381, 384; 241 NW2d 216 (1976), both holding identically.

request for the use is either granted or denied. *Carleton, Arthur Land Co, and Silver Creek Twp, supra*. It is for these rather simplistic (but very common sense) reasons that site plan submission, review and approval must always precede the approval of the underlying, proposed land use or activity to which the site plan relates and attaches, including proposed SEUP uses. If site plan review and approval is done any other way, the Legislative intent in requiring site plans, as unambiguously stated in this statute, is negated. [20]

Stucki's SEUP approvals do not comply with MCL 125.286e(3) either, which requires the site plan to be part of the record of approval of the activity authorized. App. 98a. Stucki's SEUP requests were granted final approval in 1995 (App 7-9a & 27a), but the required site plan was not approved until 2000 (App. 10-11a & 29a.). Because those approvals are in three separate records separated by four-plus years in time...which records can not be properly or legally joined...Stucki can never comply with MCL 125.286e(3). [21]

To allow Stucki to prevail, the appellate court had to arbitrarily ignore MCL 125.286e(1)&(3), rendering these statutes surplusage and nugatory. This Court has repeatedly stated that it is "loath to do" what the court did here, [22] and

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[20] Contrary to the appellate court's suggestion, ordinance §§ 4.13(a), 4.13(c)(2)(c), and 22.01, last sentence (App. 101-104a) mirror the legislative intent as expressed in MCL 125.286e(1).

[21] While the appellate court and Stucki both recited the pertinent substance of MCL 125.286e(3), their commentaries fail to describe how Stucki's SEUP approvals comply with this statutory mandate--perhaps because they don't comply. See App. 18-19a & 166-167a, respectively.

[22] *Cooper Industries, Inc v Aviall Services, Inc*, 543 US ___ (2004) (125 S. Ct. 577, 583), quoting *Hibbs, supra*. See also *Ex Parte The Public National Bank of New York*, 278 US 101, 104 (1928): "No rule of statutory construction has been more definitively stated or more often repeated than the cardinal rule that "significance and effect shall, if possible, be accorded to every word *** [so that] no clause, sentence or word shall be superfluous, void, or insignificant."

the state Supreme Court has also repeatedly stated that a Michigan court must avoid doing what the court did here. [23]

"While it is within the province of the courts to pass upon the validity of statutes and ordinances, courts may not legislate nor undertake to compel legislative bodies to do so one way or another." *Brae Burn, Inc v City of Bloomfield Hills*, 350 Mich 425, 431; 86 NW2d 166 (1957). When, as here, an appellate court legislates by rendering unambiguous statutory mandates surplusage and nugatory instead of enforcing those mandates, as required, it violates the separation of powers clause in Const 1963, art III, § 2 (App. 97a), which was enacted by the people "to preserve the independence of the three branches of government." *In re 1976 PA 267*, 400 Mich 660, 662; 255 NW2d 635 (1977).

"Where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted." *Soap & Detergent Ass'n v Natural Resources Commission*, 415 Mich 728, 751-752; 330 NW2d 346 (1982). See also *Dreyer v Illinois*, 187 US 71, 84 (1902), holding identically. That is precisely what has occurred in this case, as should be patently obvious.

D. The Obligatory Court Rules Applying Solely To The Appellate Court That It Arbitrarily Rendered Surplusage And Nugatory As Well

MCR 7.215(B)(C)&(J) (App. 108-110a) apply solely to the Court of Appeals, pursuant to MCR 1.103 (App. 105a). MCR 7.215(C)(2) states that "A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis." MCR 7.215(J)(1) clarifies that rule (and it also

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[23] *Omelenchuk, supra*, at 528, quoting *Wickens v Oakwood Healthcare System*, 465 Mich 53, 60; 631 NW2d 686 (2001); *Pittsfield Twp v Washtenaw County*, 468 Mich 702, 714; 664 NW2d 193 (2003).

adds an additional requirement) by unambiguously stating:

> Precedential Effect of Published Decisions. A panel of the Court of Appeals *must follow* the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990 that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule. [emphasis added]

Likewise, MCR 7.215(B) unambiguously states (in pertinent part) that "A court opinion *must be published* if it:

> (1) establishes a new rule of law;
> (2) construes a provision of a constitution, statute, ordinance, or court rule;
> (3) alters or modifies an existing rule of law or extends it to a new factual context; or
> (7) creates or resolves an apparent conflict of authority, whether or not the earlier opinion was reported." [emphasis added]

The rules that apply to construction of statutes apply with equal force to construction of the court rules. *People v Phillips*, *supra* at 589. Since the above-recited court rules do not define "must," its dictionary definition applies. *Halloran* and *Dastar Corp*, *supra*. *The American Heritage Dictionary*, *supra*, p 824 defines "must" as: "To be compelled." *Black's Law Dictionary*, *supra*, p 1019, states: "This word, like the word "shall," is primarily of mandatory effect."

Carleton, supra, was a first-impression decision that was decided on June 14, 1996 (*Id* at 195), and it established two new rules of law. [24] The first is when a SEUP decision

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[24] At the time this Petition was written, *Carleton* had not been reversed or modified, per Shepard's ® Citations.

becomes final (when the request is granted or denied), and the second is the standard of review the circuit court is required to apply if an appeal is taken by an aggrieved party (pursuant to Const 1963, art VI, § 28). Accordingly, *Carleton* falls squarely within the "must follow" mandates of MCR 7.215(C)(2) and MCR 7.215(J)(1). The Court of Appeals arbitrarily refused to follow and apply *Carleton's* holdings in this case, as it was required to do.[25]

The appellate court also arbitrarily refused to publish its decision in this case, even though its decision falls squarely within each of the "must publish" mandates enumerated in MCR 7.215(B)(1)(2)(3)(7), *supra*. Had the court done so, it would have all but guaranteed Petitioner a reversal (See MCR 7.302(B)(3)(5); App. 110-111a), since the "new rules of law" the court established in this case directly conflict with the prior rules of law established in *Carleton* and *Northville*, *supra*--since the decision violates the separation of powers clause in the state constitution--and since the decision also flies squarely in the face of all the other case law decisions and court rules cited herein.

The Court of Appeals rendered the above-recited, obligatory court rules surplusage and nugatory by arbitrarily ignoring them, or it arbitrarily amended these rules, which it lacked the jurisdiction to do. See MCR 1.201(A); App. 105a. On information and belief, it did so in order to unjustly enrich Stucki, or to unjustly punish this Petitioner. As shown next, the appellate court, itself, unlawfully denied Petitioner his constitutionally protected rights by doing so.

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[25] While it was not required to do so by either MCR 7.215 (C)(2) or (J)(1), the appellate panel was required to follow the unanimous "a site plan decision is not the final decision in a land use matter" holding in *Northville*, *supra* pursuant to the Supreme Court's admonition in *Chambers v Trettco, Inc*, 463 Mich 297, 309, n 3; 614 NW2d 910 (2000): "[I]t is the Supreme Court's obligation to overrule or modify case law if it becomes obsolete, and until this Court takes such action, the Court of Appeals and all lower courts are bound by that authority." (quoting *Boyd v W.G. Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993)).

E. The Court Of Appeals, Itself, Unlawfully Deprived Petitioner Of His Due Process And Equal Protection Rights, And The Courts Also Treated The Litigants (Abutting Property Owners) In A Clearly Disparate Manner With Respect To Almost Identical Land Use Requests That Each Sought, With Those Requests Being Separated By Only Three Years In Time

The US Constitution, Am XIV, § 1 (App. 96a) states, in pertinent part, that "No State shall *** deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." [26] This Court has repeatedly stated that ""[T]he touchstone of due process is protection of the individual against arbitrary action of government," whether the fault lies in a denial of fundamental procedural fairness, or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective." *County of Sacramento v Lewis*, 523 US 833, 845-846 (1998). [27]

"Property interests...are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents of*

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26 Const 1963, art I, §§ 2 & 17, state similarly. See App. 96a.

27 Like its counterpart in the 5th Amendment, the Due Process Clause of the 14th Amendment was intended to prevent the government "from abusing [its] power, or employing it as an instrument of oppression"..."to protect the people from the State." *DeShaney v Winnebago County Dep't of Social Services*, 489 US 189, 196 (1989).

State Colleges v Roth, 408 US 564, 577 (1972).

In order for an entitlement to exist, the underlying state law must contain particularized standards or criteria guiding the State's decision makers. If the decision maker is not required to base its decisions on objective and defined criteria, but instead can deny the requested relief for any constitutionally permissible reason or for no reason at all, the State has not created a constitutionally protected interest. *Olim v Wakinekona*, 461 US 238, 249 (1983). "The use of explicitly mandatory language [such as "must" or "shall"], in connection with the establishment of specified substantive predicates to limit discretion, forces a conclusion that the State has created a [protected] interest." *Kentucky Dep't of Corrections v Thompson*, 490 US 454, 463 (1989).[28]

As detailed in the preceding 15 pages of argument, Petitioner has repeatedly advanced and relied on the mandatory language of the Michigan Constitution, statutes, court rules, case law decisions, and local zoning ordinance provisions that dictated the outcome in this case. In doing so, he did not have a "unilateral expectation" (*Roth, supra* at 577) that these sources of state law would be adhered to and enforced by the courts. Rather, every litigant who seeks to

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[28] See also *Board of Pardons v Allen*, 482 US 369, 379-381 (1987); *Hewitt v Helms*, 459 US 460, 471 (1983); and *Greenholtz v Inmates of Nebraska Penal & Correctional Complex*, 442 US 1, 11-12 (1979), all holding identically. All of these cases (including *Olim* and *Thompson, supra)* utilized this approach in addressing the extent to which liberty interests exist within the prison setting, which approach was abandoned by this Court in *Sandlin v Conner*, 515 US 472 (1995). However, this Court did not foreclose use of this approach in non-prison settings. Rather, it expressly stated that such an approach "may be entirely sensible in the ordinary task of construing a statute [or court rule, municipal ordinance, or other law] defining rights and remedies available to the general public." *Id* at 481. As such, the Circuit Courts have continued to use this approach in non-prison cases. See, eg, *Gonzales v City of Castle Rock*, 366 F.3d 1093, 1102-1103 (CA10, on rehrg *en banc*, (2004); cert. grtd 543 US ___ (2004)), and the other cases cited therein.

resolve a dispute in the Michigan judicial (or quasi-judicial) system has that identical expectation, as well he should. [29]

Many litigants have succeeded on the legal points Petitioner advanced above, as evidenced by the plethora of case law and other authority cited on each point advanced. In this case, however, the Michigan courts in general--and the Court of Appeals in particular--have arbitrarily (and unlawfully) denied Petitioner his right to a decision based on the applicable and controlling law. And the courts clearly denied Petitioner his due process rights by doing so. [30]

The administrative decision regarding how many livestock Stucki should be allowed to keep was equally arbitrary. On October 12, 1995--fully 77 days after the public hearing on her SEUP requests closed (which was not the proper time to be raising this question)--the Planning Commission finally asked Stucki exactly what she wanted. App. 67a, 2nd full ¶. Her reply (eventually) was "15 rabbits, 12 adult chickens, and five adult swine, goats, sheep and cattle." App. 70a, 1st ¶. The Planning Commission then granted Stucki twice the requested number of chickens, swine, goats, sheep and cattle (App. 78a), while admitting that these numbers were wholly arbitrary. App. 68a, last ¶.

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[29] "It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Roth, supra* at 577. "Arbitrary" is defined as, *inter alia*: "Determined by whim or impulse, not by reason or law...established by a court or judge rather than by a specific law or statute...despotic." *The American Heritage Dictionary, supra*, p 124. See also *United States v Carmack*, 329 US 230, 243, n 14. (1946), defining this word similarly. The judicial (and administrative agency) actions and decisions in this case come within each of these definitions.

[30] A fair trial in a fair tribunal (one with an impartial judge) is a basic requirement of due process. *Weiss v United States*, 510 US 163, 178 (1994). Petitioner believes it is obvious that he received neither one in this matter. Rather, this case is a poignant example of the arbitrary use of judicial power for oppressive purposes, which the 14th Amendment was intended to protect the individual from. *DeShaney, supra* at 196.

The purpose of the Equal Protection clause "*** is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by the express terms of a statute or by its improper execution through duly constituted agents." *Village of Willowbrook v Olech*, 528 US 562, 564 (2000). [31] As this Court stated in *Romer v Evans*, 517 US 620, 633 (1996):

> Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." [32]

In 1992, just three years before Stucki filed her SEUP requests, Petitioner sought to construct an accessory building on his own property, in which he also wanted to establish a small dog kennel consisting of six adult dogs and one litter of puppies per year. Both of Petitioner's desired uses required SEUP approval. Unlike Stucki, Petitioner precisely defined his requested SEUP uses up-front, and he also submitted a site plan at the same time that he filed his SEUP requests, as mandated by state statute and the Township's zoning ordinance. See Arguments I (B)&(C), p 13-22, *supra*. As was the case with Stucki's livestock-keeping SEUP uses,

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[31] See also *Lawrence v Texas*, 539 US 558, 579 (2003) (O'Connor, J., concurring); *Nguyen v INS*, 533 US 53, 63 (2001); and *Nordlinger v Hahn*, 505 U 1, 10 (1992) (the equal protection clause is a directive that all persons similarly situated be treated alike.)

[32] Petitioner repeatedly advanced equal protection and "the rule of law vs. the rule of men" arguments below, most recently in his Motion For Reconsideration Of Order Denying Leave To Appeal in the state Supreme Court, dated 11-12-04. See App. 122-125a, paragraphs 12-14. His request for equal treatment was arbitrarily ignored.

Petitioner's dog kennel SEUP use--as he proposed to establish it--did not comply with the ordinance-mandated setback requirements.

In a letter dated 3-22-92, Stucki opposed Petitioner's SEUP requests for that very reason. App. 168a, ¶ 1, point 3. Stucki also opined that "*To approve these SEUPs would have a major negative impact on the residence immediately to the south of* [and approximately 120 feet from] *the proposed site, and, more importantly, set an unacceptable precedent for undermining both the spirit and the letter of our township zoning laws.*" *Id*, ¶ 3. (emphasis added). [33]

Petitioner's proposed dog-kennel SEUP request was properly denied. Stucki's proposed livestock-keeping SEUP requests should have been denied as well--but they were instead granted. [34] This Court would be hard-pressed to find a more poignant example of unequal treatment under the identical law than that which exists in this case. [35]

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[33] As Stucki apparently sees it, the unlawful approval of her livestock-keeping SEUP requests did not "set an unacceptable precedent [that undermined] both the spirit and the letter of our township zoning laws." Nor, as Stucki sees it, will her unlawful SEUP uses...92 head of adult livestock (including swine), and the countless juveniles that will soon appear once these adults begin breeding, all located a mere *80 feet* from Petitioner's master bedroom window..."have a major negative impact" on him either. As Petitioner stated many times below, *uno absurdo dato, infinita sequuntur* ("one absurdity being allowed, an infinity follows.") *Black's Law Dictionary, supra*, p 1538.

[34] While neither party recognized it at the time, Stucki's setback objection was directly on-point pursuant to the identical holdings in *Mitchell v Grewal*, 338 Mich 81, 89; 61 NW2d 3 (1953) and *Room & Board Homes v Detroit Mayor*, 67 Mich App 381, 384; 241 NW2d 216 (1976): the requirements for a SEUP use (including setbacks) must be found in the ordinance, and a SEUP use, unlike a variance, does not involve the varying of those requirements but, rather, strict compliance with the enumerated requirements. "[T]he common-law rules enunciated by state courts in judicial opinions are to be regarded as part of the law of the state." *Shelley v Kraemer*, 334 US 1, 18, n 19 (1948).

Conclusion And Relief Requested

As demonstrated above, it was the Michigan judicial system itself--including an administrative agency exercising quasi-judicial powers granted to it by the state--that denied Petitioner his constitutionally protected due process and equal protection rights in this matter. As this Court discussed at length in *Shelley*, *supra* at 14-18 (an appeal, in part, from a Michigan Supreme Court decision in a land ownership matter, with its decision being reversed in a unanimous decision for the same reasons Petitioner has advanced herein), the actions of state courts and state judicial officials are not immune from operation of the 14th Amendment's provisions. Rather, the power of the states to create and enforce property interests must be exercised within the boundaries defined by that Amendment. *Id* at 22. That clearly did not occur in this case. "And when the effect of [the state's] action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands." *Id* at 20.

THEREFORE, for the reasons set forth above, Petitioner respectfully requests that this Court grant certiorari, and that it then summarily reverse the judgment entered by the Michigan Court of Appeals on February 3, 2004, pursuant to this Court's Rule 16.1.

Dated: May 11, 2005

Respectfully Submitted,

Gary L. Gillette, D.V.M.
Petitioner, *in pro per*
P.O. Box 266
Galesburg, MI 49053
(269) 665-9743

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[35] Petitioner raised this disparate treatment issue repeatedly below, most recently in his Motion For Reconsideration Of Order Denying Leave To Appeal in the Supreme Court. App. 122-124a, ¶ 12 and n 8.

No. 04-

In The
Supreme Court of the United States

GARY L. GILLETTE, D.V.M.,

Petitioner,

v.

MARCIA V. STUCKI,

Respondent.

On Petition for a Writ of Certiorari to the Michigan Court of Appeals

PETITIONER'S APPENDIX

Gary L. Gillette, D.V.M.
Petitioner, *In pro per*
P.O. Box 266
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(269) 665-9743

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[1] The order of the documents in this Appendix does not comport precisely with this Court's Rule 14.1(i), in large part due to the tortured procedural posture this case presents, and the numerous orders, decisions, and judgments that were entered below. In view of this fact, and in order to comply with Rule 14.1(i) as precisely as possible, Petitioner--by telephone on 4-4-05 at 11:35 am--sought guidance from this Court's Clerk. The order of the documents in this Appendix is based on the assembly instructions provided during that telephone conversation.

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Order

Michigan Supreme Court
Lansing, Michigan

126020-21(70)

GARY L. GILLETTE, D.V.M.,
Plaintiff-Appellant,
v
COMSTOCK TOWNSHIP
Defendant-Appellee.

SC: 126020
COA: 240198
9th Circuit Court:
00-000135-CZ

GARY L. GILLETTE, D.V.M,
Plaintiff-Appellant,
v
MARCIA V. STUCKI,
Defendant-Appellee.

SC: 126021
COA: 240199
9th Circuit Court:
95-003152-AA

On order of the Court, the motion for reconsideration of this Court's orders of October 25, 2004, is considered, and it is DENIED, because it does not appear that the orders were entered erroneously.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

Entered: February 28, 2005 (signature)

Order

Michigan Supreme Court
Lansing, Michigan

126020 & (63)

GARY L. GILLETTE, D.V.M.,
Plaintiff-Appellant

v

COMSTOCK TOWNSHIP
Defendant-Appellee.

SC: 126020
COA: 240198
9th Circuit Court:
00-000135-CZ

On order of the Court, the application for leave to appeal the February 3, 2004, judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court. The motion to strike is also considered, and it is DENIED.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

Entered: October 25, 2004 (signature)

Order

Michigan Supreme Court
Lansing, Michigan

126021

GARY L. GILLETTE, D.V.M.,
Plaintiff-Appellant

v

MARCIA V. STUCKI
Defendant-Appellee.

SC: 126021
COA: 240199
9th Circuit Court:
95-003152-AA

On order of the Court, the application for leave to appeal the February 3, 2004, judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

Entered: October 25, 2004 (signature)

Court of Appeals, State of Michigan

ORDER

Gary L Gillette DVM
v
Comstock Township

Gary L Gillette DVM
v
Marcia V Stucki

Docket No. 240198; 240199
LC No. 00-000135-CZ

E. Thomas Fitzgerald
Presiding Judge

Janet. T. Neff

Helene N. White
Judges

The Court orders that the motion for reconsideration is DENIED.

Presiding Judge

STATE OF MICHIGAN COURT OF APPEALS

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on March 12, 2004.

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

GARY L. GILLETTE, D.V.M., Plaintiff-Appellant,	UNPUBLISHED February 3, 2004
v	
COMSTOCK TOWNSHIP, Defendant-Appellee.	No. 240198 LC No. 00-000135-CZ

GARY L. GILLETTE, D.V.M., Plaintiff-Appellant,	No. 240199
v	LC No. 95-003152-AA
MARCIA V. STUCKI, Defendant-Appellee.	

Before: Fitzgerald, P.J., and Neff and White, JJ.

PER CURIAM.

In these consolidated appeals, plaintiff appeals as of right the order granting summary disposition pursuant to MCR 2.116(C)(8) in favor of defendant Comstock Township (Docket No. 240198) and defendant Marcia Stucki (Docket No. 240199) in this land use zoning action. We affirm.

FACTS

Defendant Marcia Stucki owns an approximately thirty-four acre parcel of land in a rural area of Comstock Township. Stucki acquired the property in 1976 to engage in

small-scale farming activities.[1] Under the township's then-existing zoning ordinance, the use of the property for these purposes was permitted. In 1977, the township adopted a new zoning ordinance, "R1-A," which placed the property into a single-family residential zoning district. Under the new ordinance, small-scale farming activities were only permitted either as a valid prior nonconforming use or through the acquisition of a Special Exception Use Permit (SEUP). There is no dispute that Stucki's farming activities in existence on the date of the adoption of the new zoning ordinance could continue as a valid non-conforming use, but without the right to enlarge or expand the operation.[2]

Plaintiff acquired his six-acre adjacent property in 1985. In 1995, plaintiff complained to the township zoning administrator that Stucki had goats on her property. In response to communications from the township, Stucki removed the goats from her property pending resolution of the zoning issues regarding her right to keep goats and other animals on the property.

After removing the goats, Stucki filed two applications for a SEUP seeking approval from the township planning commission to keep horses, chickens, goats, and other unspecified farm animals on her property. Section 10.03m of the Comstock Township Zoning Ordinance (the ordinance) allows private stables as a special exception use in the R1-A zone. Section 10.03q of the ordinance allows as a special exception use in the R1-A zone the keeping of poultry, swine, goats, sheep, rabbits, and cattle on parcels of at least five acres, subject to certain conditions set forth in § 10.03q. Stucki applied for special exception use permits

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1 The land was used as a farm before Stucki acquired the land.

2 See MCL 125.286(1) and § 5.01 of the Comstock Township Zoning Ordinance.

under §§ 10.03m and q of the ordinance. Stucki did not waive her claim of lawful nonconforming use rights with respect to the keeping of animals on her property by virtue of the prior animal keeping activities, but was instead seeking the SEUPs as one way of formally defining the specific extent to which animals may be kept on the property.

On July 27, 1995, the township planning commission held a public hearing on the SEUP requests. Procedural questions arose concerning the extent of Stucki's nonconforming use rights under § 4.11.1 of the ordinance. Plaintiff argued that the animal setback requirements of § 4.11.1 of the ordinance would prevent use of the existing buildings and a substantial portion of Stucki's land for the keeping of farm animals. Stucki maintained that the "grandfather" type exemption under § 4.11.1.B of the ordinance exempted her from the setback provisions of § 4.11.1.A of the ordinance. Plaintiff also raised an issue of interpretation regarding the area to be deemed "developed for residential purposes" under subsection § 4.11.1.D of the ordinance for purposes of measuring the setback requirements of subsection A. The planning commission voted to table the consideration of the SEUP request under § 10.03q and to refer the matter to the Zoning Board of Appeals (ZBA) and to table consideration of the request for a SEUP for a private stable under § 10.03m to the next planning commission meeting.

At a meeting on August 10, 1995, the planning commission resumed consideration of Stucki's request for a SEUP for a private stable. After reviewing the regulations in § 21.20 of the ordinance governing private stables and the standards in § 4.13 of the ordinance for special exception uses, the planning commission voted to grant Stucki's request for a SEUP for a private stable consisting of not more than twelve horses.

On October 3, 1995, the ZBA considered the two issues referred to it by the planning commission. In response

to plaintiff's written request, two additional issues were placed before the ZBA with respect to this matter. First, whether the provisions of § 4.11.1.A are applicable to horses, and second, whether the keeping of goats is in violation of § 4.11.1.C.

In holding that § 4.11.1.A was not applicable to horses, the ZBA referred to (1) the fact that § 21.20 specifically addressed the setback requirements for horses, (2) the legislative history of § 4.11.1.A, which was amended in 1997 to delete its prior reference to "horses" so as to eliminate the conflict with § 21.20, and (3) the past history of interpretation of the sections by the zoning administrator in consistently applying the setback provisions of § 21.20, not § 4.11.1A, to the keeping of horses.

The ZBA also considered Stucki's claim of exemption under § 4.11.1.B from the animal setback requirements of § 4.11.1.A. The claim focused on that portion of § 4.11.1.B exempting from the setback restrictions of § 4.11.1.A: "...any land, the last active use of which, during the preceding 3 years prior to such platting or development of adjacent land, was legitimate farming or agricultural operations or involved any of the foregoing animals or poultry."

Following proofs, the ZBA upheld Stucki's claim that the property was exempt under § 4.11.1.A. Because of this determination, the question regarding the meaning of "developed for residential purposes" in § 4.11.1.D for purposes of applying the animal setback restrictions in § 4.11.1.A was moot as to this property.

Lastly, with regard to plaintiff's request for a determination that the keeping of goats on Stucki's property was in violation of § 4.11.1.C, the ZBA concluded that § 4.11.1.C was not applicable to the situation.

On October 12, 1995, the planning commission resumed consideration of Stucki's request for a SEUP under §10.03q. The planning commission voted to grant a SEUP,

subject to the conditions that (1) no more than twenty-five adult poultry, fifteen adult rabbits, ten adult swine, ten adult goats, ten adult sheep, and ten adult cattle may be kept on the property and (2) no building housing any of the farm animals shall be nearer than sixty feet to any property line or nearer than one hundred feet to any dwelling and that the farm animals shall be confined in a suitable fenced area to preclude their approaching closer than sixty feet to any dwelling on adjacent property. [3]

In November 1995 plaintiff filed a petition for review and various motions seeking to appeal the decision of the planning commission and the ZBA. At the hearing on the motion, Stucki stipulated that no additional animals would be brought onto her property while the appeals were pending. The circuit court denied plaintiffs application for leave to file a delayed petition for review of the SEUP granted on August 24, 1995, for a private stable.

In August 1996 plaintiff filed a Petition for Injunctive Relief, Damages, and Attorney Fees contesting Stucki's retaining horses and chickens on her property after the grants of SEUP permits. The claim for damages and injunctive relief was based on a nuisance per se claim premised in part upon Stucki's failure to undergo site plan review for the horses and chickens already on her property. No such claim was brought before the planning commission or the ZBA, and, consequently, neither the planning commission nor the ZBA addressed the need for site plan review for the existing animals. The township filed a motion to dismiss on the ground that the petition was a separate action not properly brought in the context of an appeal of the planning commis-

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[3] This latter condition was imposed in recognition that the setback limitations of § 4.11.1.A had been determined to be inapplicable to the property and that some minimum setback requirements were necessary to protect adjoining properties and satisfy the standards for the granting of a SEUP.

sion and ZBA decisions.

On May 5, 1997, the circuit court issued an opinion from the bench on the appeal of the planning commission and ZBA decisions. In a written judgment dated December 23, 1997, the court upheld the October 12, 1995, decision of the planning commission granting a SEUP for the limited keeping of farm animals on the property. The judgment further provided that before any of the animals permitted to use the property are allowed to be on the property "pursuant to such SEUP," a site plan would have to be submitted by Stucki and approved by the planning commission.[4] The judgment also affirmed the October 3, 1995, decision of the ZBA. The judgment declined to review the August 10, 1995, decision of the planning commission granting Stucki a SEUP for a private stable under § 10.3m of the township zoning ordinance, noting that the court had previously denied plaintiff's application for a delayed appeal of that decision. On January 18, 1998, plaintiff filed an application for leave to appeal in this Court.

The township moved to dismiss plaintiff's Petition for Injunctive Relief, Damages, and Attorney Fees. In an order entered by Judge Foley on April 29, 1998, the court reserved a ruling on the motion to dismiss until this Court ruled on the application for appeal. On July 29, 1998, this Court denied plaintiff's application for leave to appeal "for lack of merit in the grounds presented." On May 25, 1999, the Supreme Court denied plaintiff's application for leave to appeal this Court's denial of plaintiff's application for leave to appeal "because we are not persuaded that the questions presented should be reviewed by this Court." On October 11, 1999, plaintiff and the township stipulated to the dismissal of the township without prejudice.

Following the conclusion of plaintiff's appeal of the

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[4] The circuit court did not address in the judgment Stucki's right to continue to keep the existing horses and chickens on her property pursuant to lawful nonconforming use status.

two SEUPs, Stucki applied for site plan review for her private stable and livestock keeping special exception uses. On February 10, 2002, the planning commission granted site plan approval to Stucki.

Plaintiff then filed two new legal actions. The first action (lower court number 00-000138-AA) appealed the February 10, 2000, decision of the planning commission granting site plan approval. The second action (lower court number 00-000135-CZ) sought declaratory judgment, damages, and other equitable relief for various alleged statutory and constitutional violations pertaining to the site plan approval granted to Stucki. The court held that the second action be held in abeyance pending resolution of plaintiff's claim of appeal from the township's site plan approval decision. However, plaintiff voluntarily dismissed this claim of appeal.

The township moved for summary disposition on the ground that plaintiff's abandonment of his appeal and dismissal of the claim of appeal from the township's site plan approval decision amounted to an abandonment of all associated issues in that case. The township argued that plaintiff's voluntary dismissal constituted an abandonment of the issues raised in lower court number 00-000135-CZ because Michigan law does not create separate causes of action in these circumstances but explicitly provides that an appeal must be pursued to the circuit court raising all issues. The court requested additional briefing with regard to plaintiff's contention that he was entitled to pursue a separate claim for inverse condemnation or taking and, if so, whether it survived the appeal argument.

Ultimately, Judge Schaefer [5] granted summary disposition pursuant to MCR 2.116(C)(8) in favor of the township. The court pointed out that, even if dismissal was more appropriate under MCR 2.116(C)(4) for lack of

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[5] Judge Schaefer took over Judge Foley's docket.

jurisdiction, dismissal was nevertheless appropriate and neither party was misled as to grounds for dismissal. Relying on *Krohn* v Sag*inaw*, 175 Mich App 193; 437 NW2d 260 (1988), the court found that plaintiff's voluntary dismissal of his appeal of the township's decision to approve Stucki's site plan negated this action because an appeal to circuit court is the sole remedy for redress of grievances from decisions such as those complained of by plaintiff. The court distinguished *Carleton Sportsman's Club* v *Exeter Twp*, 217 Mich App 195; 550 NW2d 867 (1996) on the basis that a proper appeal was pending before the circuit court in that case, whereas in the present case the appeal was dismissed.

The trial court also rejected plaintiff's motion to amend his complaint on the basis that plaintiff could not show trespass nuisance against the township because the township neither owned nor controlled Stucki's property. The court also found that the action did not rise to the level of a taking since the action was not directly aimed at plaintiff's property and the granting of a license to a private citizen to conduct permitted activities on that person's land cannot be regarded as a taking of private property by the government for public use.

The trial court granted summary disposition pursuant to MCR 2.116(C)(8) in favor of Stucki, finding that the law imposes no requirements for prior or even contemporaneous approval of a site plan where a special land use is contemplated.

Docket No. 240198

Plaintiff first argues that the trial court improperly granted summary disposition of plaintiff's claim for damages and injunctive relief on the ground that plaintiff's remedy was to pursue an appeal of the planning commission's decision to approve a site plan and grant SEUPs rather than file an action for declaratory relief to challenge the planning

commission's decision. Whether plaintiff was required to raise the issues filed in this lawsuit in an appeal of the planning commission's decision involves a question of law that is reviewed de novo on appeal. *Cardinal Mooney High School v Michigan High School Athletic Ass'n,* 437 Mich 75, 80; 467 NW2d 21 (1991).

Municipalities derive their authority to zone solely pursuant to state enabling legislation. *Lake Twp v Sytsma,* 21 Mich App 210, 212, 175 NW2d 337 (1970). The Township Zoning Act, MCL 125.271 *et seq* (the TZA), is the enabling statute that vests a township with the authority to regulate land use. *Addison Twp v Gout (On Rehearing),* 435 Mich 809, 813, 460 NW2d 215 (1990). Various actions under the TZA, such as site-plan review and the approval of special use permit requests, are essentially administrative in nature. See, e.g., *Hessee Realty, Inc v Ann Arbor,* 61 Mich App 319, 232 NW2d 695 (1975).

MCL 125.293a authorizes a direct appeal from decisions made by a zoning board of appeals (ZBA). The ZBA is a municipal administrative body, *Schlega v Detroit Bd of Zoning Appeals,* 147 Mich App. 79, 81, 382 NW2d 737 (1985), charged with interpreting the ordinance, hearing appeals, granting variances, and performing various other functions that may arise in the administration of the zoning ordinance. See MCL 125.288-125.293; *Szluha v Avon Charter Twp,* 128 Mich App. 402, 340 NW2d 105 (1983). By statute, a ZBA's decisions (administrative acts) are final, subject to circuit court review under the standard set forth in MCL 125.293a.

An aggrieved party is free to raise substantive issues, including constitutional issues, in the appeal of the administrative decision. *Choe v Charter Twp of Flint,* 240 Mich App 662, 668, n 2; 615 NW2d 739 (2000). Indeed, plaintiff filed a claim of appeal with the circuit court from the planning Commission's February 10, 2000, site plan approval for Stucki's property. However, plaintiff abandoned

his appeal of the planning commission's decision and filed a separate action challenging the constitutionality of the township's decisions (Count I), raising alleged statutory violations (Count II), and challenging the township's decision on the basis that the decision resulted in a nuisance (Count III). At issue here is the court's finding that plaintiff should have pursued his appeal to raise the issues he attempted to raise in this action.

The circuit court relied on *Krohn* v *Saginaw*, 175 Mich App 193; 437 NW2d 260 (1989), in dismissing plaintiff's complaint. In *Krohn*, the plaintiffs were the owners of a parcel of property who challenged the administrative decision of the Saginaw Planning Commission to grant a special use permit and a variance that would allow the construction of an auto-parts store and gasoline station on a neighboring parcel. The plaintiffs in *Krohn* conceded that, in granting the special use permit and variance request, the planning commission was exercising the authority of the zoning board of appeals. *Id.* at 195-196. On the basis of this concession, a panel of this Court held that the statutory provisions governing ZBA appeals would apply and that the plaintiffs' complaint was barred because the plaintiffs failed to file their appeal within twenty-one days of the denial. [6]

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[6] In pertinent part, the panel explained:

The statutes governing zoning board decisions anticipate that final decisions are made by the zoning board of appeals, which decisions may then be appealed to circuit court. MCL 125.585(11); MSA 5.2935(11). In the case at bar, the final decision was made by defendant planning commission. However, at oral argument on plaintiffs' motion for an order to show cause, plaintiffs argued that the Saginaw Zoning Code gives to the planning commission the authority of the board of appeals to hear such matters where special requests or special uses are to be considered. Plaintiffs' argument is consistent with the manner in which Action Auto's request was handled and, therefore, we accept plaintiffs' admission in this regard as true for purposes of this appeal. It therefore follows that, if the planning commission possesses the authority of the zoning board of

In addition to appealing the decision, the plaintiffs also sought declaratory relief, equitable relief, and damages. In addressing the plaintiff's assertion that the claims for declaratory relief, equitable relief, and damages were separate, and should not have been dismissed, this Court held:

> Count III of plaintiffs' complaint alleged that their state and federal due process rights were violated and that their property had been taken without just compensation as protected by the state constitution. Count IV of the complaint alleged that the planning commission action allowed an unpermitted illegal use of the subject site and constituted a nuisance per se. Lastly, count V of the complaint asked for a declaration of the parties' rights with reference to the intended construction. With respect to each of these counts, we believe that they all raise issues relative to the decision of the planning commission and the procedures employed by the planning commission in reaching that decision. Thus, they do not establish separate causes of action, but merely address alleged defects in the methods employed by the planning commission or the result reached by the commission. Accordingly, those are issues to be raised in an appeal from the decision of the planning commission. Accordingly, since

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appeals in the present circumstances, then the provisions of MCL 125.585; MSA 5.2935 apply to the planning commission in the case at bar. Specifically, the provisions of MCL 125.585(11); MSA 5.2935(11), providing for appeals from the zoning board of appeals to circuit court, would govern an appeal of a decision of the planning commission to circuit court. Specifically, that statute allows for an appeal to circuit court from a decision of the zoning board of appeals, or, in this case, the planning commission. [*Krohn. supra* at 195-196; 437 NW2d 260.]

> plaintiffs were tardy in claiming their appeal, those counts were properly dismissed. [*Krohn, supra* at 197-198.]

Thus, a litigant may not choose to bypass the appeal procedure and proceed with separate litigation under other theories. The issues raised by plaintiff address defects in the method employed by the planning commission in reaching its decision, or in the actual result reached by the planning commission, and are not separate causes of action. Thus, the trial court properly granted summary disposition in favor of the township.

Plaintiff also argues that the trial court abused its discretion by denying plaintiff's motion to amend the complaint to allege a claim of inverse condemnation or taking.[7] The grant or denial of a motion to amend the complaint is within the trial court's discretion. *Detroit/Wayne County Stadium Authority* v 7631 *Lewiston, Inc,* 237 Mich App 43, 46-47; 601 NW2d 879 (1999).

MCR 2.118(A)(2) permits a party to amend a complaint by leave of court or stipulation by the opposing party and "[l]eave shall be freely given when justice so requires." Leave to amend should be denied only for specified reasons such as undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by amendments previously permitted, undue prejudice to the adverse party, or futility. *Tierney* v *University of Michigan Regents,* 257 Mich App 681, 687-688; 669 NW2d 575 (2003).

Here, in the original complaint, plaintiff alleged that the actions and decisions of the township deprived plaintiff of the use and enjoyment of his property, and the economic benefits therefore, including the ability to use and enjoy the property free from undue, unreasonable, and unlawful interference from Stucki and/or the township. Thus, plaintiff alleged that he was deprived of his property rights without

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[7] Plaintiff's sole argument in support of this contention is procedural; he does not address the merits of the proposed amendment.

due process, equal protection, and just compensation being paid. Plaintiff alleged a claim of inverse condemnation or taking, and therefore leave to amend the complaint would have been moot in light of the trial court's ruling that plaintiff failed to allege that the government's action caused a substantial decline of his property's value and because the township's action in granting the SEUPs was not directly aimed at plaintiff's property.

Nonetheless, inverse condemnation is the taking of private property for public use without commencement of condemnation proceedings. *Hart v Detroit*, 416 Mich 488, 494; 331 NW2d 438 (1992). To establish a taking, a plaintiff must show that the government's actions were a substantial cause of the decline of his property's value, and the government abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property. *Attorney General v Ankersen*, 148 Mich App 524, 561; 385 NW2d 658 (1986). Here, the only governmental action was aimed at Stucki's property, and whatever incidental impact that action had on plaintiff's property will not give rise to a claim for inverse condemnation. See, e.g., *Heinrich v Detroit*, 90 Mich App 692; 282 NW2d 448 (1979). Similarly, the issuance of a permit is not sufficient to impose liability for damage to neighboring property. See, e.g., *Kuriakuz v West Bloomfield Twp*, 196 Mich App 175, 177; 492 NW2d 757 (1992). The trial court properly granted summary disposition in favor of the defendant township.

Docket No. 240199

Plaintiff asserts that he was entitled to summary disposition because the township violated Michigan law by failing to conduct site plan review for a special exception use before making a determination of whether the proposed location was suitable for the use. We disagree.

In MCL 125.286(e), the TZA provides in pertinent part:

> (2) A township may require the submission and approval of a site plan before authorization of a land use or activity regulated by a zoning ordinance. The zoning ordinance shall specify the body, board, or official charged with reviewing site plan and granting approval.
>
> (3) If a zoning ordinance requires site plan approval, the site plan, as approved, shall become part of the record of approval, and subsequent actions relating to the activity authorized shall be consistent with the approved site plan.....
>
> (4) The procedures and requirements for the submission and approval of site plans shall be specified in the zoning ordinance. Site plan submission, review, and approval shall be required for special land uses and planned unit developments.
>
> (5) A site plan shall be approved if it contains information required by the zoning ordinance and is in compliance with the zoning ordinance and the conditions imposed pursuant to the ordinance, other township planning documents, other applicable ordinances, and state and federal statutes.

The use of the word "may" in a statute is construed as permissive rather than mandatory. *Old Kent Bank* v *Kal Kustom Enterprises*, 255 Mich App 524, 532; 660 NW2d 384 (2003). Subsection (2), read in conjunction with

subsection (4), provides that, while a township may or may not require activity review, site plan submission, and approval, is required for special land uses and planned unit development review. Subsection (2) addresses not the timing of site plan submission and approval, but rather whether site plan submission and approval is required for a particular use or activity.

Subsection (5) states that a site plan shall be approved if it contains the information required by the zoning ordinance, and is in compliance with the zoning ordinance and the conditions imposed pursuant to the ordinance. Subsection (5) contemplates that a site plan would incorporate the conditions imposed pursuant to special exception use review. Nothing in §16e requires site plan submission, review, and approval before authorization of the proposed use.

Section 10.03(m) of the Comstock Park (sic) Zoning Ordinance permits private and public stables and riding academies only by special exception. Section 10.03(q) permits, "subject to the provisions of Section 4.11.1" the raising and keeping of animals which either are or whose products are customarily used for human consumption. Both subsections are "subject to Section 22.00 for site plan review requirements." Section 22.00, entitled "Site Plan Review procedures," provides in Section 22.01, entitled, "Scope":

> The intent of this Article is to provide for consultation and cooperation between land developers and the Township in order that the developer may accomplish his or her objectives in the utilization of his or her land within the regulations of this zoning ordinance and with minimum adverse affect on the use of adjacent streets and highways and on existing and future uses in the immediate area and vicinity. Prior to the issuance of a building permit, the creation of

a use or the erection of a building in the district and under the conditions cited below, a site plan shall be submitted in accordance with this Article to the Planning Commission for approval. Site plans shall be required for the following uses and related development to be created in the following districts:

***

Section 22.01.2: For Special Exception Uses In:

***

C. Single-Family Residential Districts.

Section 4.13 of the ordinance provides the procedure for review of applications for uses permitted by special exception. Plaintiff contends that the site plan review under Article 22 must precede the special exception use review under section 4.13, which states, in pertinent part:

> The uses identified as special exception uses in Articles 9.00 through and including 20.0 are recognized as possessing characteristics of such unique and special nature (relative to location design, size, public utility needs, and other similar characteristics) as necessitating individual standards and conditions in order to safeguard the general health, safety, and welfare of the community.
>
> a) Petitions for the grant of special exceptions shall be filed with the Township clerk on forms provided therefore. The petitioner shall submit plans and specifications or other data or

exploratory material stating the methods by which he will comply with the conditions specified for each grant of special exception....

b) The Planning Commission shall review and decide all applications for approval of special exception uses and shall, on its own initiative, hold a public hearing after giving notice as required herein. ...

c) In hearing a request for any special exception, the Planning Commission shall be governed by the following principles and conditions:

1) The applicant for a special exception shall have the burden of proof, which shall include the burden of going forward with the evidence and the burden of persuasion on all questions of fact which are to be determined by the Commission.

2) A special exception may be granted when the Planning Commission finds from the evidence produced at the hearing that:

a) The proposed use does not affect adversely the General Plan for physical development of the Township as embodied in this ordinance and in any Master Plan or portion thereof adopted by the Township; and

b) The proposed use will not affect adversely the health and safety of residents or workers in the area and will not be detrimental

> to the use or development of adjacent properties or the general neighborhood; and
>
> c) The standards as may be set forth for a particular use for which a special exception may be granted, can and will be met by the applicant; and
>
> d) The proposed use is compatible with the natural environment and the capacities of public services and facilities affected by the proposed use.

The plain language of the zoning ordinance provides that an applicant for a SEUP must obtain two approvals before the use can be established: 1) approval of the proposed use under the standards set forth in § 4.13, and 2) approval of a site plan under Article 22.00. Until the applicant has received both approvals, the special exception use cannot be established. There is no language in the statute or the ordinance that provides that approval of a site plan must always precede approval of the proposed use.

Plaintiff has cited no authority for the proposition that site plan submission, review, and approval shall be required before authorization of a proposed special land use. In *Bruni* v *City of Farmington Hills,* 96 Mich App 664; 293 NW2d 609 (1980), a zoning case involving the construction of cluster housing, this Court held that before the cluster housing could be constructed, a site plan had to be submitted for review and approval. In that case, the use was determined to be appropriate, and then site plan approval occurred:

> In order for a cluster option to be approved, it must first be determined whether or not the land in question qualifies. In the instant case, plaintiffs' land has already been determined as

> qualifying for the cluster option. Secondly, a site plan for the proposed cluster housing must be presented. A public hearing regarding the plan is to be held, after which the Planning Commission decides whether or not to approve the site plan. *[Id.* at 667-668.]

Similarly, in the present case a petition for a SEUP was submitted. Once the township determined that the property in question was appropriate for the special exception use, a site plan was presented and the planning commission made a decision to approve the site plan. Final approval of the special exception use was not granted until after the site plan approval occurred, and thereafter final approval of the proposed use was accomplished. The trial court properly granted summary disposition in favor of Stucki.

Plaintiff also argues that the trial court erred by granting summary disposition in favor of Stucki on the ground that Stucki's existing uses in keeping horses and chickens were lawful nonconforming uses and did not constitute a nuisance per se. He asserts that Stucki's keeping of horses and chickens after August 10, 1995, was a nuisance per se. Again, we disagree.

Stucki did not implement the SEUPs she obtained for a private stable or to keep farm animals until her site plan was approved on February 10, 2000. Thus, until this time the keeping of the animals constituted a nonconforming use. A nonconforming use is established when a parcel of property continues to be used for a formerly proper purpose after it has been rezoned so as to make that use improper. Section 5.01 of the zoning ordinance provides:

> Any lawful nonconforming use existing at the time of passage of this Ordinance or any prior ordinance may be continued, provided,

> however, that except in the case of dwellings or farm buildings, the building or the lot or land involved shall neither be structurally altered, repaired nor enlarged unless such revised structure shall conform to the provision of this Ordinance for the district in which it is located.

Here, Stucki merely maintained the status quo until she obtained final approval of her site plan and was able to implement the SEUPs. The continuation of a nonconforming use need only be of substantially the same size and nature as the use when a valid zoning ordinance was passed. There is no authority for plaintiff's proposition that Stucki's filing of the SEUPs application eliminated her lawful nonconforming use rights or caused her to relinquish her claim of lawful nonconforming use status.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Janet T. Neff
/s/ Helene N. White

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF KALAMAZOO

GARY L. GILLETTE, D.V.M.,
Plaintiff,

v

MARCIA V. STUCKI, Case No. D 95-3152-AA
Defendant.

and

GARY L. GILLETTE, D.V.M.,
Plaintiff,

v

COMSTOCK TOWNSHIP, Case No. D 00-0135-CZ
Defendant.

DECISION and ORDER GRANTING MOTIONS FOR SUMMARY DISPOSITION FILED BY DEFENDANTS STUCKI and COMSTOCK TOWNSHIP

At a session of said Court held in the City and County of Kalamazoo, State of Michigan, on the 26th day of February, 2002.

Present: Honorable Philip D. Schaefer, Circuit Judge

INTRODUCTION

The controversies presented by these two actions arise out of a common set of facts. Although these files have not been consolidated, a prior scheduling order of the court resulted in motions for summary disposition being argued on

the same date. For ease of reference, the court's separate rulings will be integrated into this decision.

FACTS

Gary L. Gillette (Gillette) and Marcia V. Stucki (Stucki) own and reside upon adjacent parcels of real property located in a generally rural area within the Charter Township of Comstock (Township). In 1976, Stucki acquired her property to engage in small-scale farming activities which included bringing horses and chickens to the property. Under the Township's then existing zoning ordinance, the use of her property for these purposes was permitted. In 1977, however, the Township adopted a new zoning ordinance which placed the Stucki property into a single-family residential zoning district. Under the new ordinance, small-scale farming activities were only permitted either as a valid prior non-conforming use or through the acquisition of a Special Exception Use Permit (SEUP). No one disputes that Stucki's farming activities in existence on the date of the adoption of the new zoning ordinance could continue as a valid non-conforming use, but without the right to enlarge or expand the operation.[1]

Gillette acquired his adjacent property in 1985. For a period of approximately six weeks in 1995, Stucki acquired some goats and housed them on her 34-acre property. Gillette complained of this practice to the Township and, when contacted by the Township's ordinance enforcement officer, Stucki voluntarily removed the goats. In doing so, she tacitly agreed that the bringing of goats on to her property constituted an improper expansion of her non-conforming use status.

Two days after she removed the goats from her property, Stucki filed two applications for SEUP, seeking

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[1] See MCL 125.286(1) and Section 5.01 of the Township Zoning Ordinance.

approval from the Township Planning Commission to keep horses, chickens, goats and other unspecified farm animals on her residentially zoned property. Her petition states that she filed it to "formally establish her right to keep horses/private stables and raise and keep farm animals, such as poultry and goats." This request began the first of many hearings, lawsuits, court hearings and appellate reviews which will only be summarized to place the court's decision into context.

On July 27, 1995, the Township Planning Commission conducted a public hearing on Stucki's SEUP applications for a private stable (Ordinance Section 10.03m) and for other livestock (Ordinance Section 10.03q). Because a procedural question arose concerning the extent of Stucki's non-conforming use rights, the Planning Commission voted to separate her requests and to seek an ordinance interpretation from the Township Zoning Board of Appeals.[2] On August 10, 1995, the Planning Commission approved the concept of establishing a private stable as a SEUP with a limit of not more than 12 horses. On October 3, 1995, the Board of Appeals determined, among other things, that Stucki was exempt from certain setback requirements because of her non-conforming use status. Accordingly, on October 12, 1995, the Planning Commission approved the remaining portion of Stucki's application to allow "other livestock." With regard to both SEUP approvals, no specific site plan approval was sought or given.[3]

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[2] MCL 125.290 and the Township Zoning Ordinance (Section 28.06.2) authorize the Board of Appeals, a separate body, to render interpretations in the application and enforcement of the Ordinance.

[3] Under the Township Zoning Act and the Township Zoning Ordinance, SEUP and site plan reviews are a separate process. In other words, if a property owner wishes to establish a SEUP and if a site plan approval is required, two approvals are necessary. See MCL 125.286b, MCL 125.286e, and zoning ordinance Articles 4 and 22. It is the timing of these approvals that forms the basis of plaintiff's suit in D95-3152AA.

On November 13, 1995, Gillette filed with this court an *in pro per* appeal seeking a review of all decisions by the Township Planning Commission and Board of Appeals. This is file D95-3152AA. On August 29, 1996, he filed a petition for injunctive relief, damages and attorney fees against both Stucki and the Township alleging that the defendants violated the Township Zoning Ordinance by, respectively, maintaining and permitting without enforcement horses and chickens on Stucki's property resulting in a nuisance *per se*. The gist of his theory is that the Township committed a procedural error when it failed to require a specific site plan prior to or contemporaneous with approval of the SEUP.

On May 5, 1997, the Honorable John F. Foley issued a bench opinion affirming the Township's SEUP approval and held that Stucki must seek and obtain approval of a specific site plan before implementation of the SEUP uses. He also affirmed the decision of the Township Board of Appeals exempting Stucki from setback requirements. An order to that effect was entered December 23, 1997.

On January 13, 1998, Gillette filed an application for leave to appeal and a motion for peremptory reversal in the Michigan Court of Appeals. The application and motion were denied whereupon Gillette filed an application for leave to appeal with the Michigan Supreme Court on October 20, 1998. On May 25, 1999, the Supreme Court denied leave. On October 31, 1999, the Supreme Court denied Gillette's motion for reconsideration.

Meanwhile, on September 1, 1999, the Township and Stucki filed a renewed motion to dismiss plaintiff's petition for injunctive relief, damages and attorney fees. At the conclusion of the hearing on this motion, Gillette agreed to dismiss his case and claims against the Township without prejudice. An order to that effect was entered December 9, 1999.

Meanwhile, Stucki filed a request with the Township Planning Commission seeking site plan approval of her

approved SEUP land uses. On February 10, 2000, the site plan was approved for private horse stables and the keeping of farm animals. Following these approvals, Gillette filed two new lawsuits. In file D00-0135CZ, he asked for declaratory judgment, damages and other equitable relief against the Township, for its site plan review decisions. This suit was removed to the Federal District Court but was ultimately returned to this court. In file D00-0138AA, he took an appeal of right from the Township Planning Commission's site plan approval of February 10, 2000.

Ultimately, the court held a status conference with the parties after efforts of a special mediator to resolve all disputes had failed. On April 5, 2001, the court entered a scheduling order setting certain deadlines. Shortly thereafter, Gillette voluntarily dismissed his appeal in file D00-0138AA.

On July 13, 2001, the court heard oral arguments on motions for summary disposition and the responses thereto. By court directive, the parties supplemented their briefs on November 26, 2001, on the issue of inverse condemnation. In D95-3152AA, plaintiff has filed motions for summary disposition pursuant to MCR 2.116(C)(10) while Stucki has filed a similar motion pursuant to MCR 2.116(C)(8). In D00-0135CZ, defendant has filed a motion for summary disposition pursuant to MCR 2.116(C)(8).

STANDARD OF REVIEW

A motion for summary disposition may be granted on the basis that the opposing party failed to state a claim on which relief can be granted. Motions under MCR 2.116(C)(8) test the legal sufficiency of the claims in the pleadings. *Michigan Ins Repair Co v Manufacturers National Bank of Detroit,* 194 Mich App 668; 487 NW2d 517 (1992). All factual allegations in support of the claims are accepted as true, as are any reasonable inferences or conclusions that can be drawn from the facts. *Int'l*

Brotherhood of Electrical Workers, Local 58 v McNulty, 214 Mich App 437, 443-44; 543 NW2d 25 (1995). A motion for summary disposition should be granted only when a claim is so clearly unenforceable as a matter of law that no factual development could possibly justify right of recovery. *Abb Paint Finishing Inc* v *National Union Fire Ins Co of Pittsburgh PA,* 223 Mich App 559; 567 NW2d 456 (1997).

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual sufficiency for a claim. In *Norris* v *State Farm,* 229 Mich App 231, 234-35 (1998) citing *Quinto* v *Cross & Peters Co,* 451 Mich 358, 362-63; 547 NW2d 314 (1996), the Supreme Court set forth the following standards:

> In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in light most favorable to the party opposing the motion. [sic]

See also Radtke v *Everett,* 442 Mich 368, 374, 501 NW2d 155 (1993); *Miller v Farm Bureau Mutual Ins Co,* 218 Mich App 221, 233; 533 NW2d 371 (1996).

Granting the nonmoving party the benefit of any reasonable doubt regarding material facts, the court must then determine whether a factual dispute exists to warrant a trial. *Bertrand* v *Alan Ford Inc,* 449 Mich 606, 617-618; 537 NW2d 185 (1995); *DeFlaviis* v *Lord & Taylor Inc,* 223 Mich App 432, 435; 566 NW2d 661 (1997). A material fact has been defined as an ultimate fact issue on which a jury's verdict must be based. *Neal v Friendship Manor Nursing Home,* 113 Mich App 759, 763; 318 NW2d 594 (1982). Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is then

entitled to judgment as a matter of law. *Quinty* [sic] *v Cross & Peters Co*, 451 Mich 358; 547 NW2d 314 (1996). However, it is tradition of the court to be liberal in finding a dispute. *Porter v City of Royal Oak*, 214 Mich App 478, 488; 542 NW2d 905 (1995).

FILE D00-0135CZ
GILLETTE v COMSTOCK TOWNSHIP

By any objective standard the thrust of plaintiff's complaint in this litigation is a declaratory action. The title to his complaint says so. One hundred thirty-three paragraphs posture the suit as such. Fourteen of the sixteen prayers for relief ask the Court to make numerous and sundry declarations.[4] No one seriously doubts that this is a declaratory action, separate from the appeal file.

The Township has not filed an answer to the complaint. Rather, the Township seeks summary dismissal pursuant to MCR 2.116(C)(8) on the grounds that Gillette's sole recourse in the subject matter of this suit is through an appeal. Relying on *Krohn* v *Saginaw*, 175 Mich App 193 (1988), the Township argues that Gillette's dismissal of his appeal in file number D00-0138AA negates the instant action. Gillette's response is that an appeal is only one of at least two avenues he could pursue to seek adjudication of his grievances and that the instant action can stand on its own.

In *Krohn*, plaintiff filed a multi-count complaint challenging a decision by the Saginaw City Planning Commission concerning a property owner's request for a special land use permit and zoning code variance. Because Plaintiff had filed his suit beyond the time for taking an appeal, the City moved to dismiss the complaint based on a lack of jurisdiction over the subject matter. The lower court

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[4] The fifteenth prayer requests a jury trial, and the last prayer contains the usual "such other relief" request seen in virtually all civil complaints.

agreed, and the Court of Appeals affirmed.

In affirming the lower court, the Court of Appeals considered plaintiffs argument that several counts should not have been dismissed because they represented different causes of action not governed by the appeal period stated in MCR 7.101. Not unlike this suit, these counts included due process constitutional claims, nuisance per se claims and a request for declaratory relief. In rejecting plaintiffs' claims, the Court said the following at page 198:

> With respect to each of these counts, we believe that they all raise issues relative to the decision of the Planning Commission and the procedures employed by the Planning Commission in reaching that decision. Thus, they do not establish separate causes of action, but merely address alleged defects in the methods employed by the Planning Commission or the result reached by the Commission. Accordingly, those are issues to be raised in an appeal from the decision of the Planning Commission. Since plaintiffs were tardy in claiming their appeal, these counts were properly dismissed.

Krohn stands for the proposition that an appeal to circuit court is the sole remedy that a party may seek for a redress of grievances from decisions like those complained of here. This decision is not inconsistent with a similar holding in *Sportsman's Club* v *Exeter Twp,* 217 Mich App 195 (1996) which held that an appeal from a final decision rendered under a Township Zoning Ordinance is constitutionally authorized by Const 1963, art 6, §28.

Plaintiff also claims that the provision of the Township Zoning Act allowing for appeals utilizes the discretionary "may", thus leaving open the door for an

aggrieved party to seek other forms of judicial relief. [5] Plaintiff argues that if the Legislature intended an appeal to be the sole avenue of resort, it would have used the mandatory "shall" in that statute. Plaintiff's argument fails on several grounds.

First, the quoted statutory provision refers to appeals from a board of appeals and not, as here, from a planning commission. Moreover, even if the statutory provision is construed as plaintiff urges, the contextual application of the work "may" merely affirms the right to an appeal, not an acknowledgment of the opportunity to choose from among several options. To construe otherwise is to relegate justice to that of a slave of grammar.

Plaintiff's position is not improved by his argument that MCR 2.605(C) authorizes actions corollary to an appeal. This rule, which deals with declaratory judgments, provides in subsection C, as follows: "The existence of another adequate remedy does not preclude a judgment for declaratory relief in an appropriate case." Unfortunately, *Krohn* clearly establish that the present action is not "an appropriate case."

That an appeal is the proper and sole remedy to the exclusion of an action for declaratory relief is consistent with longstanding precedent arising out of administrative law settings. In *Lajiness v Yaeger*, 352 Mich 468 (1958), the Supreme Court held that a declaratory judgment procedure was inappropriate to contest an administrative decision of a pension board regarding whether a firefighter was entitled to an injury related pension where certiorari or other permissible review is available. This decision recognizes that administrative bodies are empowered to make findings of fact and law that are not subject to collateral attack by a retrial under the guise of declaratory relief and a jury trial.

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[5] MCL 125.293(A) provides, in relevant part, that "...a person having an interest affected by the zoning ordinance may appeal to the circuit court." (Emphasis supplied)

Similarly, in *St. Paul Fire and Marine Ins Co v Littky,* 60 Mich App 375 (1975), the Court of Appeals held that an action for declaratory relief cannot be maintained to resolve disputes that are within the exclusive jurisdiction of an administrative agency. In essence, these and similar holdings stand for the proposition that it is necessary to guard against undue interference with administrative agencies by, in essence, allowing for two "trials," one before the agency and the other in circuit court before a jury.

It cannot be doubted that disputes such as are presented here fall within the administrative, as opposed to legislative, category. *Krohn* and *Sportsman's Club* stand for this proposition. See, also, *Keating Int'l Corp v Orion Twp,* 51 Mich 122 (1974).

What all of this simply means is that plaintiff's exclusive remedy on the theories advanced by his declaratory action are in the nature of an appeal and not by way of declaratory relief. Plaintiff has abandoned his appeal. But the analysis does not end there.

By invitation of the court, the parties have also briefed issues of inverse condemnation and, by implication, trespass-nuisance. In his response, plaintiff seeks leave of the court to amend his complaint. Having reviewed these briefs and case authority cited, it is apparent that plaintiff cannot plead a valid claim for monetary damages based on either theory.

Indeed, *Krohn* seems to stand for the proposition that these matters are brought to the attention of the court through an appeal. Moreover, from a perspective of a trespass-nuisance, a governmental entity is not liable simply for issuing permits that enable another to create an alleged nuisance. *McSwain* v *Redford Twp,* 173 Mich App 492 1988). Moreover, a governmental entity is not liable for damage created by a nuisance unless the entity has either created the nuisance, owns or controls the property from which the nuisance arose, or employed another that it knows

is likely to create a nuisance. *Kuriakuz v West Bloomfield*, 196 Mich App 175 (1992). Without passing on the question of whether a nuisance exists, it is fair to observe that if one can be proven, it is owing to the actions of Stucki and not the Township. Moreover, the Township neither owns nor controls Stucki's property; needless to say, it certainly has not employed anyone to create any nuisance by its actions in this case.

Governmental action rising to the level of a "taking" in violation of state and federal constitutions requires extreme circumstances resulting in serious injury to the property. *Bond* v *DNR*, 183 Mich App 225 (1989). The granting of a license or permit to a private citizen for the purpose of conducting permitted activities from that person's land cannot be regarded as a taking of private property by the government for public use. *Attorney General* v *Ankersen*, 148 Mich App 524 (1986). Liability for inverse condemnation does not lie where the action complained of is not directly aimed at the claimant's property. *Id* Moreover, the mere fact that a regulation happens to deprive the owner of the most profitable use of his property does not necessarily establish the owner's right to just compensation. *Andrus* v *Allard*, 444 US 51 (1979).

Under the facts presented in this case, plaintiff is unable to plead facts stating a cause of action. The action of the Township in permitting Stucki to engage in small scale farming operations on her 34-acre parcel is neither extreme nor directly aimed at Gillette's property. Moreover, unlike cases where a governmental entity might divert surface waters from public roadways onto adjacent property causing damage and a "taking", any perceived loss suffered by Gillette does not arise from Township activity. Finally, Gillette does not and cannot claim diminution of the most profitable use of his property. His motion to amend his complaint, a copy of which was not attached to his motion, is denied.

This court is not unmindful of appellate decisions that indicate that it is inappropriate for a circuit court to enter summary disposition in appellate matters on the basis of failure to state a claim upon which relief can be granted. The rationale behind this is that an appeal, by its nature, ordinarily states a justiciable claim. See *Macenas v Village of Michiana*, 433 Mich 380 (1989); *Sportsman's Club, supra.* This principle, of course, assumes an appeal that is proper. Referring to *Macenas*, the panel in *Sportman's Club* noted the following on page 202:

> ...a motion for summary disposition pursuant to MCR 2.116(C)(8), which tests only the pleadings, was not appropriate, because if a proper appeal to the circuit court had been filed, a "cause of action" was stated, at least for purposes of obtaining appellate review of the Board's decision in accordance with the statute. (Emphasis supplied)

Obviously that situation did not exist in *Krohn*, because the time for taking an appeal there had expired when the action was filed. Therefore, the "appeal" was not proper. The situation in *Krohn* is analogous to the case at bar. Plaintiff has elected to file two separate actions, the instant one for declaratory relief and the dismissed appeal. In *Krohn*, the Circuit Court dismissed the complaint based upon a lack of jurisdiction over the subject matter. Normally, such motions are brought pursuant to MCR 2.116(C)(4). However, in the instant action, defendant has moved for a dismissal based upon a failure to state a claim upon which relief can be granted pursuant to MCR 2.116(C)(8).

In the absence of a proper appeal, plaintiff's complaint fails to state a claim upon which relief can be granted. Therefore, summary disposition pursuant to MCR 2.116(C)(8) is proper. Even if improper, dismissal is likewise

warranted pursuant to MCR 2.116(C)(4) for lack of subject matter jurisdiction. The mere fact that summary dismissal is appropriate under a subpart different from that brought does not prohibit a court from proceeding under the former so long as neither party has been mislead. *Ruggeri Electrical Contracting Co Inc* v *Algonac,* 196 Mich App 12 (1992). Here, neither party was mislead as both parties fully briefed the issues discussed in this opinion.

To summarize, plaintiff's complaint should be dismissed under MCR 2.116(C)(8). Even if dismissal is more appropriate under MCR 2.116(C)(4), an order of dismissal may also enter because neither party has been mislead as to the theories for dismissal. Plaintiff's motion to amend his complaint is denied.

FILE D95-3152AA
GILLETTE v STUCKI.

Reduced to its lowest common denominator, the central issue raised by the volumes of paperwork accompanying these motions is quite simple, namely, whether approval of a site plan must be given **before** SEUP approval. Plaintiff answers in the affirmative; everyone else answers in the negative.

An understanding of the issue presented requires a basic review of the law of zoning. The enabling authority for a township to enact zoning regulations is the Township Zoning Act, being 1943 PA 184, as amended. [6] This frequently amended statute permits townships to "...provide by zoning ordinance for the regulation of land development and the establishment of districts in the portions of the township...which regulate the use of land and structures." [7] It is customary for zoning ordinances to provide for both

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6 MCL 125.271, *et seq*

7 MCL 125.271

permitted and special land uses in their several zoning districts.

Permitted land uses are those uses that are allowed without any prior review or public hearing by a zoning body. A special land use (SEUP in this case) is a different matter. Section 16b of the Act [8] allows a township to provide for special land uses which may be permitted in the several zoning districts only after review and approval by, in the case of Comstock Township, the Planning Commission.[9] Special land uses are identified uses of land that are otherwise compatible with other permitted uses but which, owing to their unique character, require a review process before establishment.[10] Subsection 16(b)(2) contains substantially detailed notice requirements to adjacent property owners and the public at large. By its very nature, a hearing on the creation of a special land use focuses on the compatibility of the proposed use with surrounding land uses as opposed to specific site designs.

Section 16e of the Zoning Act [11] allows for a site-plan review process to assure that a proposed land use is in compliance with all applicable regulations. As with special land uses, the zoning ordinance must also contain procedures and requirements for submission and approval before the authorization of a land use or activity. Here, the reviewing body is more concerned with the specifics of the proposed

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8 MCL 125.286b

9 The term "special land use" is not a term of art. In Comstock's cast, they are known as "special exception uses."

10 For example, commercial campgrounds may be generally compatible with most uses permitted in an agricultural or rural residential zoning district. However, because this use is closely associated with commercial experiences such as traffic and noise, a special review process is necessary before allowing them to locate in such districts.

11 MCL 125.286e

use. Accordingly, the ordinance requires far more detail than might be required for a SEUP. This includes lot contour lines, specific building set-back and height data, and the like. Unlike special land uses, a decision here focuses less on compatibility and far more on compliance with specific ordinance requirements for site developments.

Relying on statutory construction and case law, plaintiff advances the argument that the process employed by Stucki and the Township in approving the SEUPs and the site plans is flawed because site plan approval is required **before** approval of the special land use. This court disagrees.

A plain reading of the statutory scheme discloses no such requirement. Had the Legislature intended the result urged by plaintiff, it could have easily said so. A similar review of the Township Zoning Ordinance compels the same conclusions.

Moreover, the two processes address different goals. The creation of a special land use examines the compatibility of a proposed use with its surrounding environment. As a result, the statute requires detailed notice requirements in advance of a public hearing, requirements that are not imposed on site plan review hearings. As for the latter, this process focuses on compliance with specific site development requirements imposed by the zoning ordinance.

There are practical considerations, as well. Economical common sense dictates that developers are unlikely to commit significant resources toward the development of specific plans for a site development until the site has been approved for a special land use. Once that approval has been given, they can then begin to commit resources for the development of detailed plans to show how the approved concept will fit at the intended location.

Plaintiff's reliance on *Bruni* v *Farmington Hills*, 96 Mich App 664 (1980) is misplaced. In fact, *Bruni* supports this court's decision. In that case, the Farmington Hills Planning Commission had approved the compatibility of

cluster housing development on plaintiff's single-family zoned property. Observing this, the Court noted at 668:

> Secondly, a site plan for the proposed cluster housing must be presented. A public hearing regarding the plan is to be held, after which the Planning Commission decides whether or not to approve the site plan.
>
> The zoning ordinance in question provides specific and definite guidelines that must be met in order for land to qualify for the cluster option. ...The fact that the Planning Commission must approve a site plan before cluster housing can be implemented does not make the ordinance unconstitutional because approval will follow if the site plan conforms with already established guidelines. The purpose of submitting a site plan before final approval is given is to ensure that the specific plan offered does, in fact, conform to the already established guidelines. To require separate guidelines for the approval proceedings would be impossible, because each site plan is different. The proper standards, therefore, exist prior to the submission of a site plan; in determining whether to approve or disapprove a site plan, the Planning Commission merely applies the particular plan submitted to the established guidelines to ascertain if the plan is in conformity therewith.

Plaintiff misreads this case. In *Bruni,* the cluster housing option was approved before a site plan was submitted for approval. This is the functional equivalent of the establishment of a SEUP in the present case. Thereafter, *Bruni* observed that a site plan review approval would be

necessary **before final approval,** which is, as well, the functional equivalent of the situation here. Nowhere does this holding mandate site plan approval before the determination of the compatibility of the intended use with surrounding properties.

Plaintiff's arguments and citations to authority notwithstanding and consistent with the intent of Judge Foley's earlier ruling, this court cannot conclude that the law imposes requirements for prior or even contemporaneous approval of a site plan where a special land use is contemplated. Accordingly, defendant's motion for summary disposition must be granted, thereby, denying plaintiffs similar motion.

CONCLUSIONS

In file D00-0135CZ, the court grants defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) for the failure of plaintiff to state a cause of action. Even if dismissal is more appropriate under MCR 2.116(C)(4), an order of dismissal may also enter on the basis that neither party has been mislead as to the theories for dismissal. Plaintiff's request to amend his complaint is likewise denied.

In file D95-3152AA, defendant Stucki's motion for summary disposition is granted pursuant to MCR 2.116(C)(8) for the failure of plaintiff to state a cause of action. Conversely, plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10) is denied. All prior orders of the court are hereby affirmed.

IT IS SO ORDERED.

(signature)
Philip D. Schaefer,
Circuit Judge

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF KALAMAZOO

GARY L. GILLETTE, D. V.M.,
Petitioner/Appellant,
v. File No. B 95-3152 AA

MARCIA V. STUCKI,
Respondent/Appellee, **DECISION**
v.

COMSTOCK CHARTER TOWNSHIP
PLANNING COMMISSION and
COMSTOCK CHARTER TOWNSHIP
ZONING BOARD OF APPEALS
Respondents/Appellees.

At a session of said Court held in the County Building in the City and County of Kalamazoo, State of Michigan, held on the 5th day of May, 1997

Present: Honorable John F. Foley, Circuit Court Judge

PROCEEDINGS

The Clerk: Court calls the case of Gillette versus Stucki, B 95-1352 AA. Counsel state their appearances for the record.

Mr. Rathert: Ken Rathert on behalf of Gary Gillette.

Mr. Sparks: Kenneth Sparks on behalf of Comstock Charter Township Planning Commission and Zoning Boards of Appeals.

Mr. Brown: Steven Brown also on behalf of Comstock.

Mr. Walton: Garry Walton on behalf of Marcia Stucki.

The Court: Today is set for a bench decision on the petitioner's appeal from a decision of the Comstock Charter Township Planning Commission granting the respondent's application for -- that's the Respondent Marcia Stucki's application for special exception use permit for keeping farm animals in a single family residential zone.

The petitioner has also appealed from a decision of the Comstock Charter Township Zoning Board of Appeals decision that an animal use setback requirement of the zoning ordinance didn't apply to the respondent.

The decisions of these two bodies are on October 12th, 1995. The Planning Commission after reviewing the standards in the zoning ordinance governing granting of the special exception use permit voted to grant a special exception use permit subject to the condition that, one, no more than 25 adult poultry, 15 adult rabbits, 10 adult swine, 10 adult goats, 10 adult sheep and 10 adult cattle may be kept on the subject property and, two, no building housing any of the farm animals shall be located nearer than 60 feet to any property line or nearer than 100 feet to any dwelling, and that the farm animals shall be confined in a suitable, fenced area to preclude their approaching closer than 60 feet to any dwelling on adjacent property.

And the other decision being appealed is the decision of the Zoning Board of Appeals considered the setback issue of Respondent Stucki's claim of exemption under Subsection B from the animal setback requirements of Subsection A of Section 4.11.1.

Respondent Stucki's claim focused in particular on that portion of Subsection B exempting from the setback restrictions of Subsection A "Any land, the last active use of which, during the preceding three years prior to such

platting or development of adjacent land, was legitimate farming or agricultural operations or involved any of the foregoing animals or poultry."

Proofs were submitted that a building permit to construct the house now occupied by the petitioner was obtained in 1973 and the house constructed in 1974, meaning the three-year period would have had to commence in 1971. Proofs were submitted regarding the keeping of farm animals on the subject property both during this time period and other time periods.

After hearing the proofs submitted in this matter, the Zoning Board of Appeals upheld respondent; that is, the Respondent Stucki's claim that the subject property was exempt under Subsection B from the setback restrictions in Subsection A of Section 4.11.1.

The petitioner's arguments are that the Planning Commission and the Zoning Board of Appeals did not have authority to make the above decisions and that the decisions are not supported by sufficient evidence.

Section 4.13 (c) (2) of the zoning ordinance sets forth the following standards for the granting of a special exception use permit: "(a), proposed use does not affect adversely the general plan for physical development of the township as embodied in this ordinance and in any master plan or portion thereof adopted by the township and, (b), the proposed use will not affect adversely the health and safety of residents or workers in the area and will not be detrimental to the use or development of adjacent properties or the general neighborhood and, (c), the standards as may be set forth for a particular use for which a special exception may be granted can and will be met by the applicant and, (d), the proposed use is compatible with the natural environment and the capacities of public services and facilities affected by the proposed use."

Michigan law recognizes the quasi-judicial nature of special exception use decisions and the exercise of discretion

involved when evaluating whether the requirements and standards for an approval of special exception use have been shown to be met by the applicant.

The Planning Commission reviewed the zoning ordinance standards as well as the specific requirements of Section 10.03q of the zoning ordinance set forth its basis for finding each of these standards were met. This includes the natural setting of the subject property; its sizes; other animal keeping activities in the area, including horses and cattle; the fact that the majority of the neighbors in the neighborhood had not opposed the request, the nature of past animal keeping activities on the property, which many neighbors had indicated had been an asset not a detriment to the neighborhood; and the limited type and number of farm animals that were being allowed under this special exception use.

It is the holding of this Court that the Planning Commission was within its authority to grant the application and its decision is supported by competent, substantial and material evidence on the whole record. Zoning Board of Appeals had authority to interpret the setback section of the zoning ordinance as referred to by the Planning Commission. The Planning Commission had referred it to the Zoning Board of Appeals for interpretation under Section 28.06.2.

The record supports the decision of the Zoning Board of Appeals that the named farm animals had been on Respondent Stucki's property during three years before creation of the petitioner's parcel to exempt the setback requirement for livestock.

Section 22.01 reads -- this is from the Comstock Zoning Ordinance:

> Prior to the issuance of a building permit, to the creation of a use or the erection of a building, a site plan shall be submitted in accordance with this article to the Planning Commission for approval. Site plans shall be required for the

following uses and related development to be created in the following districts. Section 22.01.2. for special exception uses in single-family residence districts. Section 22.02, site plan. Site plan shall be prepared by or under the supervision of a professional engineer, architect, architectural engineer or land surveyor licensed or registered by the State of Michigan.

Respondent Stucki has not yet submitted a site plan. Before any of the animals permitted to use the property are permitted to be on the property such a site plan must be submitted and approved by the Planning Commission.

I again decline to rule on the appeal from the Planning Commission's grant of the application for the special exception use permit for the stable of horses because I have already decided the application for delayed appeal on that decision. I denied that application.

In conclusion, I also hold that the other arguments of the petitioner are without merit.

Therefore, the Court affirms the decisions of the Zoning Board of Appeals of October 3rd, 1995 and the decision of the Planning Commission of October 12th, 1995, granting Respondent Stucki a special exception use permit which is affirmed.

Statutory costs if any are awarded to the respondent. The respondent may prepare the order.

Petitioner's Note: This decision was issued orally from the bench on the date indicated above, and subsequently transcribed by Alison R. Huffman, Certified Court Reporter (CSR-0945). Certain non-substantive portions of the transcript (e.g., the attorney listings and the Table of Contents) were deleted by Petitioner to conserve space.

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF KALAMAZOO

GARY L. GILLETTE, D.V.M., Petitioner/Appellant, v	File No. B 95-3152 AA Hon. John F. Foley (P13549)
MARCIA V. STUCKI, Respondent/Appellee,	**JUDGMENT**
and	
COMSTOCK CHARTER TOWNSHIP PLANNING COMMISSION and COMSTOCK CHARTER TOWNSHIP ZONING BOARD OF APPEALS, Respondents/Appellees.	[A handwritten (by the Court) date of 12/23/97 was placed here]

JUDGMENT

At a session of said Court held on the 23rd day of December, 1997 in the City of Kalamazoo, County of Kalamazoo and State of Michigan.

PRESENT: Hon. John F. Foley (P13549),
Circuit Court Judge

The Court having reviewed the Petition for Review, all motions, and the respective supporting and responsive briefs, the administrative record, and related pleadings filed by the parties, and having heard arguments in open court, and being otherwise advised in the premises:

IT IS HEREBY ORDERED AND ADJUDGED:

1. The October 12, 1995 Comstock Charter Township Planning Commission decision granting Appellee MARCIA V. STUCKI (hereinafter "Stucki") a Special Exception Use Permit under Section 10.03.q. of the Charter Township of Comstock Zoning Ordinance is affirmed. Before any of the animals permitted to use the property are permitted to be on the property pursuant to such Special Exception Use Permit, a site plan shall be submitted by Appellee STUCKI and approved by the Comstock Charter Township Planning Commission.

2. The October 3, 1995 decisions of the Comstock Charter Township Zoning Board of Appeals respecting Appellee STUCKI and Section 4.11.1 of the Comstock Charter Township Zoning Ordinance are affirmed.

3. The August 10, 1995 Comstock Charter Township Planning Commission decision granting Appellee STUCKI a Special Use Exception Permit under Section 10.03.m. of the Comstock Charter Township Zoning Ordinance is not reviewed, the Court having previously denied Appellant's application for a delayed Petition for Review of the Special Exception Use Permit granted to Appellee STUCKI for a private stable.

4. Statutory costs are awarded to Appellees.

(signature)
Hon. John F. Foley (p13549)
Circuit Court Judge

Comstock Charter Township Planning Commission – Minutes Of Meeting Held On July 27, 1995 (as corrected 8/14/95)

A regular meeting was held by the Comstock Charter Township Planning Commission on Thursday, July 27, 1995, beginning at 7:30 pm at the Comstock Charter Township Hall.

Members Present:

Melvin J. Klooster, Chairman
Steven J. Gazdag, Vice-Chairman (arrived late),
Richard M. Jones, Secretary (arrived late)
Carl L. Betz
Stanley J. Heidanus
Timothy J. Hudson
Miriam A. Shannon
William G. Shields
Donald F. Watts

Members Absent: None

Also present were Township Attorney Kenneth C. Sparks and approximately fifty other interested persons.

Petitioner's Note: Only that portion of the minutes of this meeting applicable to Respondent Stucki have been recited below (pages 6-15 in the original)

Marcia Stucki - Special Exception Use Public Hearing

The next matter to come before the Planning Commission was consideration of the application of Marcia Stucki for special exception use permits for a private stable for the keeping of horses and the keeping of farm animals

such as chickens and goats pursuant to, respectively, Sections 10.03.m and 10.03.q of the Comstock Charter Township Zoning Ordinance. The special exception use permits are being sought for an approximately 34 acre parcel of land at 2088 South 36th Street within the Township. The subject property is in the "R1-A" Single Family Residential District zoning classification.

Ms. Shannon indicated that since she has had some. prior involvements with some of the people involved in this matter and has had charges made against her by one of the persons with respect to a prior zoning matter, she would request to abstain from participation in this matter and will be leaving the room while this matter is being discussed. In response to a question from the Chairman, Ms. Shannon indicated that she was not requesting Planning Commission permission and that she was abstaining from participation in this matter. Ms. Shannon then left the room.

Upon motion of Mr. Jones, duly seconded, the Planning Commission then voted unanimously, except for the abstention of Ms. Shannon, to open the public hearing on this matter.

Mr. Garry Walton then addressed the Planning Commission and indicated that he was speaking on behalf of Ms. Stucki. He indicated that the subject property consisted of 34 acres. He indicated that Ms. Stucki had purchased the property in 1976 and that a chicken coop and two barns had been in existence on the property when she purchased the property. He then made reference to a diagram showing the existing fencing on the property. He indicated that historically horses and chickens have been kept upon the property. He indicated that Ms. Stucki was requesting a special exception use permit both for a private stable on her property and for the keeping of farm animals primarily for her own use or consumption. Mr. Walton than showed a series of photographs of the subject areas and reviewed those photographs with Planning Commission members. He

indicated that the existing chicken coop is roughly 120' inside the property line.

In response to a question from Mr. Shields, Mr. Walton indicated that Ms. Stucki had originally acquired a 24 acre parcel and had subsequently acquired an adjacent 10 acre parcel immediately to the north of the original 24 acre parcel. Mr. Walton indicated that the prior resident had kept approximately 250 chickens upon the property. He indicated that Ms. Stucki had kept chickens on a smaller scale. In response to a question from Mr. Jones, Mr. Walton indicated that Ms. Stucki had kept horses on the property when she first acquired it and that chickens were brought onto the property by her shortly thereafter.

Mr. Walton indicated that the special exception use application had been made when complaints had been received with respect to goats that Ms. Stucki had introduced on her property. He indicated that the goats had subsequently been moved back from the property line. He indicated that the goats are not on the property at present. He indicated that Ms. Stucki might possibly want to have sheep on her property in the future.

Ms. Stucki indicated that she was seeking special exception use approval to formalize the status of her property with respect to the keeping of farm animals and horses. She indicated that grandfather clauses are vague in terms of their limits.

In response to a question from Dr. Gary Gillette, the Township Attorney indicated that the issue of the existence and extent of any lawful nonconforming use rights Ms. Stucki might have with respect to the keeping of horses or farm animals on her property was a separate issue from the issue of whether she should be granted the requested special exception use permits. He indicated that the issue of the existence and extent of any lawful nonconforming use rights that Ms. Stucki might have with respect to the keeping of horses and farm animals was an issue that if pursued would

have to be decided by the Zoning Board of Appeals. He indicated that the fact that Ms. Stucki had made application for the special exception use permits did not cause her to waive any claims she might have with respect to lawful nonconforming use status with respect to the keeping of horses or farm animals. Mr. Walton indicated that historical use is pertinent to the special exception use standards.

The Chairman noted that the Planning Commission had received 12 letters in support of the application and passed those letters to other Planning Commission members for their review. The Chairman then inquired whether there were any other persons who wished to make comments in support of the application.

Mr. Carl Frederick indicated that he lived on a 14 acre parcel of land directly east of the subject property and had lived at that site for 11 years. He indicated that he had never had a problem with Ms. Stucki. He indicated that he had no opposition to the request as long as it was not a commercial operation.

Mr. John Hogg of 2225 South 36th Street then addressed the Planning Commission. He indicated that he had lived at his residence since 1959 and that the prior owner of the subject property had horses, chickens and cats, the same as Ms. Stucki. He indicated that the keeping of these animals had been continuous. He indicated that he enjoyed the quality of the presence of the farm in the area. He indicated that it was an asset to rural living. He indicated that he had never had a problem with respect to the subject property and supported the application.

Ms. Jo Oostveen indicated that she lives on ML Avenue and is a distant neighbor of the subject property. She indicated that she does a lot of hiking and walking in the area. She indicated that she had never observed any problems on Ms. Stucki's property and that it is a nice neighborhood. She indicated that every time she walks in the area, she hears Dr. Gillette's dogs barking and does not hear

animal noises from Ms. Stucki's property. She indicated that Ms. Stucki has a beautiful property. She indicated that she was surprised that Dr. Gillette's house had been built so close to the barn on Ms. Stucki's property. She indicated that she was mad because this was an instance of one neighbor being turned against another. She indicated that there are pluses and minuses in living in such a neighborhood, such as dogs barking and the smell of manure.

Mr. Phil Kenney of 2672 South 36th street indicated that he had moved into his property in 1974. He indicated that there had been stables on the Titus property. He indicated that there were farms in the area and that it had a rural atmosphere. He indicated that it would be a shame if Ms. Stucki could not keep animals on her 34-acre property.

Mr. David White indicated that he lives on 36th Street and that there is approximately 80 acres between his property and the subject property. He inquired as to whether a special exception use permit, if granted, would apply only to the current owner of the property or would go with the property. It was indicated that a special exception use permit applies to the property, not to the individual person owning that property. Mr. White expressed concern that the application was vague. He indicated that the subject property is a beautiful property. He indicated that he was concerned about the animal keeping activity growing or the property being sold to another person in the future who might increase the activity. He indicated that he would like the request to be clearer.

Mr. Hogg inquired of the Township Attorney as to whether the provision under Section 10.03.q.3 that the raising and keeping of such livestock be used primarily for the use or consumption by the occupants of the property and not be raised primarily for profit would be a limit on the scope of any animal activity approved under this provision. The Township Attorney answered in the affirmative. He noted that the Township Planning Commission would also

have authority to impose more specific limits with respect to the scope of the animal keeping activity.

Mr. David Tomczak of 10765 East ML Avenue then addressed the Planning Commission. He indicated that he had some hesitation with respect to favoring the request since there is a piece of property next to him that could be developed and his house is only 50' from the border of that property. He indicated that in the future he could be in the exact same position as Dr. Gillette. He noted, however, that when he retires, he might want to keep chickens on his property, but that he would want them to be a distance from any houses. He indicated that he would not want goats running around. He indicated that the goats on Ms. Stucki's property had been kept closer to Dr. Gillette's property than the chickens. He indicated that there was a goat path which led directly to the fence abutting Dr. Gillette's property. He indicated that Dr Gillette had a problem accordingly with goats running close to the vicinity of his bedroom. He noted that the property owned by Dr. Gillette is the area where Mr. Clay Williams, the former owner of Ms. Stucki's property, had kept chickens. He indicated that goats had not been kept there. Mr. Tomczak indicated that it was his understanding that other animals were scheduled to be kept on Ms. Stucki's property, including pigs.

Mr. Walton indicated that there were no goats on Ms. Stucki's property when Mr. Tomczak visited the property. He indicated that it was a deer path. Ms. Stucki indicated that she had no interest in keeping pigs on her property. She indicated that she would be happy with a restriction against keeping pigs on her property.

Mr. Tomczak indicated that the droppings on the path were goat droppings, not deer droppings. He indicated that the nature of the path was such that it was a goat path. He indicated that Dr. Gillette had had to put up with goats for two months. He indicated that this raised a question as to whether Ms. Stucki had proven that she could be trusted with

respect to the keeping of goats. He indicated that she might consider an approach where she just sought approval of the keeping of horses and chickens on her property at the present time and that she could later apply for the keeping of goats.

Ms. Stephanie Rysenga of 3920 Winding Way indicated that she had visited Dr. Gillette's property. She indicated that she had observed horses coming right up to the fence along his property line. She indicated that she had observed chickens near the fence and had observed numerous cats. She indicated that while she was in Dr. Gillette's garage with him, she had heard the bleating of goats. She indicated that this was a nuisance. She indicated that as a home owner and tax payer, she believed the Zoning Ordinance was intended to provide protection. She indicated that if a Zoning Ordinance can be changed because someone wants to do something, then there is a problem. She indicated that the devaluing of property is a serious issue. She indicated that she had read articles in the newspaper about property owners who were angry about a pig farm in close proximity to their property. She indicated that there was also a concern about air quality and the desirability of having fresh air and peace. She indicated that prospective buyers of property would have such expectations. She indicated that she loves animals, but there is a place for raising animals and that she would move to an area properly zoned if she wished to keep animals. She indicated that she had laughed when she heard the goats from Dr. Gillette's property and was incredulous. She indicated that weeks went by and complaints were made by Dr. Gillette before the goats were finally removed. She indicated that the request did not encompass any limit on numbers of animals or on species of animals. She expressed concern about the effect on quality of life.

Dr. Gary Gillette then addressed the Planning Commission. He indicated that right now there is an appearance that this is a popularity contest. He indicated that

the decision made by the Planning Commission has certain legal impacts. He indicated that he would question the status of the property with respect to the claim of lawful nonconforming use. He indicated that when the Township's current Zoning Ordinance took effect on January 1, 1977, Ms. Stucki's property was in a residential zone and that it had remained in a residential zoning classification since that time. Dr. Gillette then reviewed the definition of agriculture set forth in section 2.01.2 of the Township Zoning Ordinance. Attorney Walton inquired as to whether there was any time limit on how long an individual speaker could speak. The 'I'ownship Attorney indicated that the Planning Commission had not established a time limit. Dr. Gillette indicated that all relevant information should be considered. Dr. Gillette then reviewed the definition of farm set forth in section 2.01.32 of the Township Zoning Ordinance. He noted that riding or boarding stables are not considered a farm under this definition. He indicated that the farmstead that Ms. Stucki claims in the attachment to her application is not a farm under the Zoning Ordinance. He indicated that the property has always been zoned residential. He indicated that it had not been actively farmed for years.

Dr. Gillette noted that a lawful nonconforming use can not expand. He indicated that he need not go further with this point since it is the special exception use application which is at issue. He indicated that Ms. Stucki had attempted to position her property as something other than it is.

Dr. Gillette indicated that he would like to provide a brief historical perspective with respect to this matter. He then distributed to each Planning Commission member and to Mr. Walton copies of various tax assessment records indicating how various properties are zoned and how they were classified for tax purposes.

The Chairman inquired as to where Dr. Gillette is going. He indicated that what Dr. Gillette had said so far was not relevant. Dr. Gillette indicated that Ms. Stucki's property

is treated as agricultural for tax purposes. The Chairman indicated that this was irrelevant to the special exception use request. Mr. Gazdag concurred in this statement. The Chairman indicated that he would allow Dr. Gillette nine more minutes to speak.

Dr. Gillette drew the Planning Commission's attention to section 4.11.1 of the Zoning Ordinance, which Section is referenced in section 10.03.q. He reviewed section 4.11.1.D which provides that for purposes of this Section, land within 100' of either side of a dwelling house, as measured along the road or street on which the same is located and 300' deep as measured from the front property line, shall be considered "developed for residential purposes." Dr. Gillette then reviewed the setback provisions contained in Section 4.11.1. A. He noted that the grazing of livestock is prohibited within 50' of unplatted land zoned R1-A which is developed for residential purposes. He indicated that this shows a serious site design flaw. He indicated that a 150' side setback with respect to dwelling house would therefore be required for all grazing animals and a 250' setback would be required with respect to the housing of livestock. Dr. Gillette then reviewed certain measurements that he had made as to the approximate distances of the barn and shed structures on Ms. Stucki's property from the area around his dwelling house that he indicated would be considered pursuant to section 4.11.1. D as "developed for residential purposes". He indicated that the setback requirements of Section 4.11.1 would prohibit the keeping of farm animals in the structures and that if special exception use approval was given for the keeping of such animals, they would have to be kept on the other side of Ms. Stucki's driveway. Dr. Gillette noted that special exception uses are subject to site plan review requirements. He indicated that it would be appropriate to say that there are serious site design problems. He indicated that the diagram included with Ms. Stucki's application was in error and that there had been no

surveying as to the distances shown on the diagram. Dr. Gillette's time for speaking then expired.

The Township Attorney indicated that it was his general experience that it is better to give someone more due process than may be required than less. He indicated that he would accordingly encourage the Planning Commission to allow Dr. Gillette additional time to speak after other persons present had had an opportunity to make further comments with respect to this matter.

Ms. Dorothy Kollin of 9477 Miller Drive indicated that Ms. Stucki would be welcome in her neighborhood.

Mr. Carl Frederick of 2085 South 36th Street indicated that he lives in the neighborhood and he only hears Dr. Gillette's dogs bark. He indicated that this dispute is deeper than the issue of Ms. Stucki's animals and involves a prior zoning matter and is a personal thing between Ms. Stucki and Dr. Gillette. He indicated that he did not hear animals from Ms. Stucki's property.

Attorney Walton indicated that his response would be briefer than the 20 minute statement made by Dr. Gillette. With respect to the issue raised by Dr. Gillette regarding section 4.11.1, Attorney Walton indicated that subsection B contains a grandfather provision with respect to the setback requirements set forth in this section. He indicated that the farm on Ms. Stucki's property had been in existence at the time the home now occupied by Dr. Gillette was built and therefore the setback requirements are not applicable. Mr. Walton further indicated that even if the setback requirements were deemed applicable, this would not be a basis for denying her special exception use application, but would just mean that she would have to live with the setback requirements.

Dr. Gillette indicated that Mr. Walton had not submitted any proof with respect to his claim of a grandfather status.

Mr. Hogg indicated that he sensed a minority of two speaking through the voice of three. He indicated that the majority of the persons addressing this matter supported the request. He encouraged the Planning Commission to give Ms. Stucki the support she needs to avoid micromanaging of her property. Mr. Tomczak inquired as to whether the Planning Commission could be more precise as to what it allows if it grants a special exception use permit. He encouraged the Planning Commission to impose more specific limits, not just for Ms. Stucki but for other owners.

The Chairman then indicated that in accordance with the suggestion of the Township Attorney he would give Dr. Gillette the floor for a few additional minutes. A discussion then ensued as to how much additional time Dr. Gillette should be allowed for his comments. In response to a question from the Township Attorney, Dr. Gillette indicated that it would require roughly 30 minutes to conclude his comments. He indicated that he believed it might be better to table this matter. He indicated that based on comments made, he might wish to have his attorney present with respect to this matter. He indicated that there were serious site plan flaws with respect to the application. Mr. Heidanus recommended that the Chairman allow Dr. Gillette an additional ten minutes. He noted that there were a number of other people present with respect to other items on the agenda for public hearing. Mr. Jones indicated that he was willing to listen to Dr. Gillette, but that he would like to hear succinct objections. After further discussion, the Chairman indicated that Dr. Gillette would be allowed an additional ten minutes, which would represent a total of 30 minutes allowed him for making his statement to the Planning Commission.

Dr. Gillette requested that this matter be tabled. Dr. Gillette then read a portion of MCL 125.293a providing that if a court finds the record inadequate to make the review required under that section or that there is additional

evidence which is material and with good reason was not presented, the court shall order further proceedings before the Board on conditions which the court considers proper. He indicated that if there is an appeal, this provision would be relevant and would be applied. Dr. Gillette concluded his comments prior to the expiration of the additional ten minutes allotted him.

Mr. Walton requested that the Chairman read the names of the people submitting letters supporting the request. Mr. Jones noted that these letters would be kept as part of the record of this proceeding. Mr. Walton indicated that this would be satisfactory.

Mr. Heidanus then moved that the public hearing be closed. The motion was seconded and passed unanimously except for abstention by Ms. Shannon.

Mr. Heidanus then moved that this matter be tabled. The Township Attorney indicated that he would like to briefly comment with respect to some of the legal issues raised. He noted that Dr. Gillette had raised the concern regarding the setback requirements under section 4.11.1. having the effect of prohibiting Ms. Stucki from using the barn and shed structures for the housing of animals. The Township Attorney noted that section 4.11.1. D would, if literally read, be consistent with the interpretation of this section applied by Dr. Gillette. The Township Attorney indicated that it might also be contended that the area deemed "developed for residential purposes" should be deemed to terminate at Dr. Gillette's property line. He indicated that this was a question of interpretation which the Planning Commission might choose to have resolved prior to making its decision on the special exception use application. The Township Attorney further noted that Mr. Walton's response to Dr. Gillette's contention regarding section 4.11.1 was in part to claim that Ms. Stucki was exempt from the setback requirements in subsection A by virtue of the "grandfather provision" contained in subsection B. The

Township Attorney indicated that the issue of what lawful nonconforming use rights, if any, the applicant has under section 4.11.1. B was an issue properly determined by the Zoning Board of Appeals, not the Planning Commission. He indicated that the Planning Commission accordingly had the option of either referring these two issues to the Zoning Board of Appeals for resolution prior to further Planning Commission action or, if the Planning Commission was inclined to grant a special exception use permit, make such permit subject to compliance with the applicable Zoning Ordinance setback requirements as determined by interpretation of the Zoning Board of Appeals of the Zoning Ordinance or by a claim of lawful nonconforming use status. He indicated that the choice of which approach to take rested with the Planning Commission.

Mr. Heidanus moved to refer these two issues to the Zoning Board of Appeals.

The Chairman inquired as to whether the applicant had any preference. Mr. Walton indicated that the applicant's first preference would be that the Planning Commission grant special exception use approval, subject to compliance with applicable setback requirements as they may be determined by the Zoning Board of Appeals. He indicated that the applicant would request in the alternative that the Planning Commission address the issue of a special exception use permit for a private stable, since this was not subject to the setback requirements of section 4.11.1.

Dr. Gillette indicated that he believed Section 4.11.1. was applicable to horses. He noted that the second page of Ms. Stucki's special exception use application referred to the grazing of horses on her property. He indicated that section 4.11.1 refers to the grazing of livestock and that he believed horses would be grazing livestock and within the scope of the setback provisions set forth in this Section. The Township Attorney indicated that in his opinion horses do not fall within the scope of the setback provisions contained

in section 4.11.1 and are not livestock for purposes of that provision. The Township Attorney noted that separate setback requirements for the keeping of horses are set forth in the Zoning Ordinance. The Township Attorney further indicated that Section 4.11.1.A had previously contained a reference to "horses" and that this reference had been deleted by ordinance amendment to avoid conflict with the separate setback provisions contained for horses under the regulations pertaining to private stables.

Mr. Walton indicated that while the applicant would prefer approval for both special exception use applications subject to compliance with applicable setback requirements, the applicant alternatively would request approval of the special exception use application for a private stable. He indicated that no dissent had been voiced with respect to this request. Dr. Gillette indicated that this was only because he had not been allowed the opportunity to put his dissent on the record.

After further discussion, Mr. Heidanus amended his motion to move that the Planning Commission table consideration of the application for a special exception use permit for a private stable to the next Planning Commission meeting and the Planning Commission table consideration of the special exception use application under 10.03.q so as to refer the two issues raised by the Township Attorney to the Zoning Board of Appeals for resolution.

Mr. Shields seconded the motion. The motion passed with a vote of 7 to one, with Mr. Jones voting in the negative and Ms. Shannon abstaining from participation.

Ms. Shannon then returned to the Planning Commission.

Comstock Charter Township Planning Commission - Minutes Of Meeting Held On October 12, 1995 (as corrected 10/30/95)

A regular meeting was held by the Comstock Charter Township Planning Commission on Thursday, October 12, 1995, beginning at 7:30 p.m. at the Comstock Charter Township Hall.

Members Present:

Melvin J. Klooster, Chairman
Steven J. Gazdag, Vice-Chairman
Richard M. Jones, Secretary
Carl L. Betz
Timothy J. Hudson
Miriam A. Shannon
William G. Shields

Members Absent:

Stanley J. Heidanus
Donald F. Watts

Also present were Township Attorney Kenneth C. Sparks and approximately ten other interested persons.

[Petitioner's Note: Only that portion of the minutes of this meeting applicable to Respondent Stucki have been reproduced here (pages 3-13 in the original). As indicated on p 64-66, *infra*, Petitioner takes serious issue with the content and accuracy of not only these minutes, but with all of the minutes that the Township's Attorney prepared with respect to the Stucki Special Exception Use Permit matter. See Appx, p 147-149a for a complete copy of Petitioner's October 11, 1995 complaint letter.]

Marcia Stucki - Special Exception Use Application

The next matter to come before the Planning Commission was consideration of the application of Marcia Stucki for a special exception use permit for the keeping of farm animals such as chickens and goats pursuant to Section 10.03.q. of the Township Zoning Ordinance. The special exception use permit is being sought for an approximately 34 acre parcel of land at 2088 South 36th Street within the Township. The subject property is in the "RI-A" Single Family Residential District zoning classification. The Chairman then reviewed what had previously transpired with respect to this request. The Chairman noted that in July, the Commission had conducted a public hearing on two special exception use requests, one for a private stable and the other for farm animals pursuant to Section 10.03. q. He indicated that the Planning Commission had referred questions pertaining to Section 10.03.q. to the Zoning Board of Appeals. He noted that the Planning Commission had subsequently granted a special exception use permit for a private stable. He noted that the Zoning Board of Appeals had recently taken action on the matters referred to it by the Planning Commission and that each Planning Commission member had a copy of the proposed minutes of the Zoning Board of Appeals meeting. The Chairman noted that the public hearing on the special exception use request back before the Commission had been closed. He noted that the Planning Commission had received written material from Dr. Gary Gillette since the time of the public hearing. He noted that some time ago, the Planning Commission members had received a lengthy written submission from Dr. Gillette. He noted that the Commission had received a letter dated October 11, 1995, from Dr. Gillette raising objection with respect to the Zoning Board of Appeals minutes. He noted that the Commission had also received from Dr. Gillette additional letters in opposition to the Marcia Stucki special

exception use applications and a tabulation of such letters submitted to the Planning Commission.

The Township Attorney noted that the questions referred by the Planning Commission to the Zoning Board of Appeals involved Section 4.11.1 of the Zoning Ordinance, not Section 10.03.q.

In response to a question from the Township Attorney, Ms. Shannon indicated that she would be abstaining from participation in this matter for reasons previously stated by her. Ms. Shannon then excused herself from the Planning Commission table. The Township Attorney indicated that he believed it would be appropriate at this time to address comments contained in Dr. Gillette's October 11, 1995, letter. The Township Attorney noted that minutes are not intended to be a verbatim transcript of what is said at a meeting, they are only a summary. He indicated that the courts have not required transcripts of municipal bodies. He indicated that it is unfortunate that Dr. Gillette feels that there are inaccuracies in the minutes. He indicated that with respect to the concern voiced by Dr. Gillette that this might taint the record, he would indicate that if there is an appeal of the Zoning Board of Appeals' decision or the proceedings before the Planning Commission, he would have no objection to including an unedited copy of the videotapes made by Dr. Gillette of the meetings as part of the record that would be filed with the Court. With respect to the taking of minutes by the Township Attorney, the Township Attorney noted that it has been the procedure of Comstock Township and a number of other townships for many years to have their attorney prepare the minutes. He indicated that unless the Planning Commission wished to make a change in this practice at this time, the practice could continue. The Township Attorney indicated that with respect to the other concerns in Dr. Gillette's letter, they are noted and the letter

will be a part of the record of the proceedings. He indicated that unless Planning Commission members have actions they wish to take or comments they wish to make with respect to the matters raised in the letter, the Planning Commission would be in a position to proceed with consideration of the special exception use application before it.

Mr. Gazdag indicated that he would not argue with the attorney taking the minutes. Mr. Shields indicated that he believed the Township Attorney has done an excellent job and that except for occasional word corrections, few changes were required. Mr. Jones indicated that as secretary of the Commission, he believed the Township Attorney had done a fine job in taking the minutes. Mr. Jones indicated that he took offense to the notion expressed in Dr. Gillette's letter that the Planning Commission was being led and that the Planning Commission can't think and act for itself. Mr. Jones indicated that frequently if an important point is not reflected in the proposed minutes, the Planning Commission will get that point in the next minutes.

Mr. Garry Walton, attorney for Ms. Stucki, indicated that he had no objection to Dr. Gillette's videotapes being included as part of the record.

The Township Attorney indicated that with respect to the two questions referred by the Planning Commission to the Zoning Board of Appeals, the Zoning Board of Appeals had determined with respect to the first question that Ms. Stucki's property is exempt pursuant to Section 4.11.1.B from the animal setback requirements contained in Section 4.11.1.A. The Township Attorney indicated that with respect to the second question referred by the Planning Commission pertaining to the meaning of the phrase "developed for residential purposes" for purposes of applying the setback restrictions in Section 4.11.1., the Zoning Board of Appeals

had determined that this question was moot in light of its resolution of the first question and had accordingly not addressed that question further.

The Township Attorney then reviewed with the Planning Commission the standards set forth in Sections 10.03.q. and 4.13(c) of the Township Zoning Ordinance. He noted that under subsection 1 of Section 4.13(c), the burden of proof was on the applicant with respect to questions of fact pertaining to the special exception application. The Township Attorney indicated that the standards set forth in Sections 10.03q. and 4.13(c) were the relevant standards upon which the Planning Commission must base its decision with respect to the special exception use application before it.

The Chairman then requested that the applicant clarify its request. Mr. Walton indicated that the applicant was requesting special exception approval allowing Ms. Stucki to keep each of the enumerated types of animals set forth in Section 10.03.q.1 on her property, with the limitation that those animals be used primarily for her use and not be raised for profit. Mr. Walton indicated that while Ms. Stucki did not have current plans to place each type of animal upon her property, this request was being made because it is impractical for her to come back every time she might want a different type of animal upon her property. He indicated that, at present, Ms. Stucki intends to continue keeping chickens and horses on her property but had no other immediate plans for different types of animals. He noted that Ms. Stucki's property consisted of 34 acres. He indicated that Ms. Stucki would like permission to have up to 37 chickens on her property.

Ms. Stucki then explained that her request with respect to chickens was made because the minimum order

for day-old chicks was 25. She indicated that one half of the chicks would be gotten rid of before they became adults. She indicated that accordingly there could be 12 adults and 25 chicks being the maximum at any one time on her property.

In response to a question from Mr. Jones, Ms. Stucki indicated that she might sometimes butcher chickens, she might give some away or she might sell some. Ms. Stucki indicated that the figure of 12 adults was in recognition that some chicks would be lost to disease and predators before adulthood.

Mr. Walton indicated that Ms. Stucki had no present intention to place goats or pigs on her property. He indicated that at one time she had given consideration to putting sheep on her property. He indicated that all of the farm animals kept by Ms. Stucki on her property would be no closer to Dr. Gillette's property than the existing fence on Ms. Stucki's property. He indicated that the fence is approximately 100' from the neighboring house at the closest point. He indicated that this area was where chickens had historically been kept on the property. He indicated that Ms. Stucki had not considered the requested minimum numbers of other types of farm animals.

Mr. Jones indicated that he would feel better if limits were given and indicated that he would like an idea of the maximum numbers.

Mr. Gazdag indicated that he understood Mr. Jones' concerns, but it could be difficult to come up with a finite number. He noted that sometimes farm animals breed. He indicated that if an arbitrary number such as ten is picked, it should be recognized that one sow could have 15 pigs. He indicated that it might be appropriate to impose a limit in terms of adult animals on the property.

Mr. Betz noted that Section 4.11.1.C. of the Zoning Ordinance, which prohibits the keeping of poultry, wild foul or animals in any area where the same becomes obnoxious by reason of odors, noise or sanitary conditions as determined by the Zoning Board of Appeals, would govern. Mr. Betz indicated that the Zoning Board of Appeals had said that the property is a farm. The Township Attorney indicated that the Zoning Board of Appeals had made the determination that Ms. Stucki's property was exempt, pursuant to Section 4.11.1.B, from the animal setback limitations contained in Section 4.11.1.A. and had not specifically addressed whether the property was a farm. Dr. Gillette indicated that he disagreed with this statement. Dr. Gillette read from page 12 of the proposed October 3, 1995, Zoning Board of Appeals minutes the statement that "Mr. Haase further indicated in support of his motion that the evidence submitted showed the subject property had been built as a farm, was a farm and is a farm." The Township Attorney indicated that the issue before the Planning Commission is whether the requested special exception use satisfies the standards referenced by him previously, not whether the subject property is a farm.

Mr. Jones indicated that he believed there should be something in any special exception use approval limiting the number of adult animals on the property. The Chairman inquired of the Township Attorney as to whether the Zoning Ordinance had enough controls with respect to the proposed animal keeping use. The Township Attorney referred to the standards governing the granting or denial of the special exception use. He indicated that the Zoning Ordinance contained no other controls than those contained in Section 10.03.q. and Section 4.11.1.C. He indicated that the Planning Commission would have authority to impose reasonable conditions on any special exception use approval it gave with respect to the subject application.

Mr. Walton indicated that Ms. Stucki would be willing to limit the number of farm animals on her property to a maximum of 15 rabbits, 12 adult chickens and five adult swine, goats, sheep and cattle.

Dr. Gillette indicated that at the July 27, 1995, Planning Commission meeting, Ms. Stucki had stipulated that she did not wish to have any pigs on her property. Mr. Walton indicated that Ms. Stucki had said that she did not want pigs at this time, but that she wanted to have the option. Dr. Gillette read from page nine of the July 27, 1995, Planning Commission minutes an excerpt that "Ms. Stucki indicated that she had no interest in keeping pigs on her property. She indicated that she would be happy with a restriction against keeping pigs on her property." **[Petitioner's Note: See page 54a, *supra*; 2nd full paragraph; last two sentences.]**

Ms. Stucki indicated that she would like to have the keeping of pigs as an option. She noted that the City of Kalamazoo had recently approved a special permit for the keeping of a pot-bellied pig in the City. She indicated that this was a minor point and that she would be willing to forego the keeping of pigs on her property.

Mr. Jones inquired of Mr. Gazdag as to, with respect to the four categories of animals for which a five adult limit had been suggested, which category would be the noisiest. Mr. Gazdag indicated that the cows would be noisiest if the calves were taken away. Mr. Jones noted that Dr. Gillette had expressed a concern as to goats. Mr. Jones indicated that he would be willing to consider eliminating approval for the keeping of goats since that was the problem area.

Dr. Gillette indicated that he would like to clarify his position. He indicated that he was not opposed to the keeping

of horses on Ms. Stucki's property, although he did not necessarily agree as to the number of horses that the Planning Commission had approved. He indicated that of the 12 horses that had been approved, it should be recognized that the area of Ms. Stucki's property in which they would be kept could be condensed to 15 acres, since there is no fencing on that portion of her property north of the easement going through her property. Dr. Gillette indicated that significant issues had been missed and that the issues sent by the Planning Commission to the Zoning Board of Appeals weren't the issues that got answered by it. Dr. Gillette indicated that if one can't control the numbers of animals, there is a snowball effect. He indicated that his position was that allowing horses in the residential area was okay. He indicated that if Ms. Stucki wishes to go beyond the keeping of horses, she should purchase agriculturally zoned land where she could keep such animals by right. He indicated that if Ms. Stucki had a lawful nonconforming use with respect to the keeping of such animals, he wouldn't be arguing. He indicated that the issue of whether she had a lawful nonconforming use was not answered. He indicated that if she had any lawful nonconforming use, those lawful nonconforming use rights have been abandoned.

Mr. Gazdag inquired as to whether Dr. Gillette was contending that right-of-ways are not usable as farm property. Dr. Gillette indicated that while he was not a legal expert, it was his belief that Ms. Stucki couldn't fence across the easement. Mr. Gazdag indicated that another portion of the same utility easement running across Ms. Stucki's property runs across land that Mr. Gazdag farms and that fencing is located on that easement.

Mr. Walton indicated that land could be used as pasture under an easement. He indicated that the applicant was not addressing lawful nonconforming use issues. He

indicated that points raised regarding the historic use of the property had been presented only as to the standards governing special exception use requests to show that such use is compatible. Mr. Walton indicated that the signed letters submitted by Dr. Gillette were written by people who had not seen the land. Mr. Walton indicated that the keeping of horses and pigs upon the property was part of the historical use of the property. He noted that the property consists of 34 acres. He indicated that the numbers discussed would still result in less than one animal per acre.

Dr. Gillette noted that the Zoning Ordinance does not discuss exotic animals and that a llama has been kept on the property in the past. He expressed concern regarding ostriches and emus. Mr. Jones indicated that the Township had the authority to control the keeping of such animals if it becomes a problem.

Mr. Shields noted that the definition of farming contained in Webster's Dictionary refers to livestock and the raising of wild or domestic animals, including fish ponds. He indicated that his parents had been involved in farming and that they had not raised the same thing every year. He indicated that farming changes with the situation of the farmer. He indicated that whether one raises wild or domestic animals depends on the farming situation. He indicated that he couldn't see why Ms. Stucki's 34 acres would not be a farm. He indicated that he would consider it to be farm.

Mr. Hudson noted that subsection 1 of Section 10.03.q. specifies the types of animals which may be allowed by special exception use approval. He noted that exotic animals are not included among the categories listed in subsection 1. Mr. Hudson indicated that there is a permitted right under the Zoning Ordinance to keep such animals.

The Township Attorney indicated that the keeping of such animals under Section 10.03.q. is permitted only if the applicant meets the standards for obtaining special exception use approval. The Township Attorney indicated that the issue before the Planning Commission is not whether the subject property is a farm, but whether the applicant meets the previously discussed standards for obtaining special exception use approval.

Mr. Gazdag noted that page 63 of the Zoning Ordinance contains certain numbers in terms of the relationship between different species of animals. He indicated that based upon these numbers pertaining to a concentrated animal feeding operation, if Ms Stucki wanted to have five cattle, then ten sheep should be deemed reasonable.

Mr. Hudson then moved that the Planning Commission grant the applicant a special exception use permit subject to the condition that there be no more than 12 adult chickens, 15 adult rabbits and ten adults of each of the remaining categories of animals listed under Section 10.03.q.1. of the Zoning Ordinance. By way of reasons in support of his motion, Mr. Hudson then reviewed the standards set forth under Section 4.13 (c) (2) of the Zoning Ordinance. With respect to subsection a, Mr. Hudson indicated that the proposed use would not adversely affect the general plan for physical development of the Township. He noted that while the subject property is in a residential zone, a variety of uses are allowed in that zoning classification. He further noted that the multiple-family zoning district is not limited to multiple family dwelling uses, but also allows other uses such as single family residences. With respect to subsection b, he indicated that there was no evidence of an issue of safety with respect to the proposed use. He indicated that with respect to the

standard that the proposed use not be detrimental to the use or development of adjacent properties or the general neighborhood, he noted that the majority of the neighbors had not opposed the special exception use. He indicated that a neighbor opposing the request has kennels for his dogs and Dr. Gillette has noted that other horses are kept in the area besides the horses on Ms. Stucki's property.

With respect to subsection c, Mr. Hudson indicated that this standard was satisfied and noted that there has been raising of animals on the subject property. With respect to subsection d, Mr. Hudson indicated that the proposed use would not affect public services and is compatible with the natural environment. He indicated that does, coyote and horses are located in the area and that the subject property is in a natural setting. Mr. Shields seconded the motion.

Mr. Hudson indicated that it should be further noted that the provisions of subsections 1, 2 and 3 of Section 10.03.q. are satisfied. He then reviewed those standards. He noted that the number limits set forth in his motion were consistent with the requirement of subsection 3 that the raising and keeping of such livestock be used primarily for the use or consumption by the occupants of such premises and not be raised primarily for profit.

In response to a question from the Township Attorney, Mr. Hudson indicated that the reference to 12 adult chickens would include other types of poultry. In response to a question from Mr. Hudson, Ms. Stucki indicated that she worked full time for The Upjohn Company.

With respect to subsection 2 under Section l0.03.q, Mr. Shields noted that the subject property is more than five times larger than the minimum five acre requirement in subsection 2.

Mr. Gazdag inquired whether Mr. Hudson would be willing to raise the limit on adult poultry that may be kept on the subject property to 25. He indicated that this would be more consistent with the ratio of animals set forth on page 63 of the Zoning Ordinance and would give greater latitude with respect to allowing other types of poultry.

Mr. Hudson and Mr. Shields both indicated that they agreed to the amendment to the motion.

Mr. Gazdag indicated that with respect to other reasons in support of the motion, within less than one mile from the subject property, there is a former dairy farm that now raises heifers. He indicated that just over one mile from the subject property, there is a commercial swine raising operation involving in excess of 3,000 head. He indicated that across the highway from the subject property there are several horses kept in the area. He indicated that the subject property is not in a subdivision.

The Township Attorney noted that the applicant had spoken in terms of keeping the proposed animal raising activity no closer to Dr. Gillette's property than would be allowed by the existing fencing. The Township Attorney indicated that unless the Planning Commission imposed such a limitation as a condition to its approval, the applicant or a future owner of the property would be able to locate the farm animals closer to the neighboring property.

Mr. Betz indicated that he was uncomfortable with allowing up to ten pigs to be kept on the property. He indicated that Ms. Stucki had expressed a willingness to withdraw that portion of her request. He indicated that he also had concern as to goats. He indicated that the Commission should try to avoid future problems. He indicated that as the motion stands, he will be voting in the negative. He indicated that this whole situation had been

piqued because of the problem the goats kept on the property presented.

Mr. Hudson inquired whether an application for the keeping of swine on the subject property could be made at a future time. The Township Attorney indicated that the Planning Commission could consider a future special exception use request for the keeping of swine upon the subject property if there were a material change in circumstances from the present, if the applicant withdrew that portion of her request pertaining to the keeping of swine, if the Planning Commission chose to deny approval of keeping of swine at this time but specifically reserved the right to review that issue in the future, or if the Planning Commission was presented with a materially different proposal.

Mr. Jones indicated that he could support the motion with the number limitations contained in it. Dr. Gillette expressed concerns as to goats on the property. Mr. Jones indicated that the Planning Commission could hear future special exception use requests with respect to the property.

In response to a question from the Commission, the Township Attorney indicated that if the meeting was reopened for public comment, then all persons present wishing to make comment would have to be allowed to do so.

Mr. Hudson noted that Section 4.11.1.C is a prohibition of animal keeping activities if they become obnoxious. He indicated that some responsibility must be left with the property owner. He indicated that if there was a complaint under this section, it would come back to the Township.

Mr. Gazdag indicated by way of further support for the motion that two species had been brought up. He noted that the City of Kalamazoo had recently allowed a pig as a pet. He noted that pygmy goats are more often considered as pets. He indicated that the factual information on page 63 of the Zoning Ordinance pertaining to the relationship of numbers of different farm animals was based in terms of manure production.

Mr. Jones indicated that he agreed with Mr. Gazdag. He expressed concern if this will exacerbate a volatile situation and result in multiple matters coming before the Zoning Board of Appeals. Mr. Betz indicated that one cannot compare a miniature pig to a farm pig.

The Township Attorney noted that he had previously inquired whether the Planning Commission wished to impose a condition that the keeping of farm animals on the subject property be no closer than the existing fencing located in the vicinity of Dr. Gillette's property. Ms. Stucki indicated that the closest that the fence is to the neighboring house is 98 feet. Mr. Walton indicated that the fence is 73 feet from the property line at the closest point. Mr. Walton indicated that the applicant would propose a requirement retaining the existing fence line and keeping animals no less than 90 feet from the neighboring house. Ms. Stucki indicated that she would propose as an alternative that the setback for the farm animals be the same as that for horses. Referring to Section 21.20.b. and 21.20.c., Ms. Stucki indicated that this would mean a building used for the keeping of farm animals would have to be located no closer than 60 feet to any property line and not nearer than 100 feet to any dwelling and that the animals would have to be confined in a suitable fenced area to preclude their approaching nearer than 60 feet to any dwelling on adjacent premises. Mr. Hudson and Mr. Shields then indicated that

they wished to amend their motion to incorporate these setback requirements. Mr. Jones indicated that inclusion of this requirement would provide a measure of security as to setback.

Dr. Gillette requested that the Township Attorney restate the motion as amended. The Township Attorney indicated that it was his understanding that the motion was to grant the request for a special exception use permit pursuant to Section 10.03.q, subject to the following conditions: (1) that no more than 25 adult poultry, 15 adult rabbits, ten adult swine, ten adult goats, ten adult sheep and ten adult cattle may be kept on the subject property; and (2) that no building housing any of the farm animals shall be located nearer than 60 feet to any property line or nearer than 100 feet to any dwelling and that the farm animals shall be confined in a suitable fenced area to preclude their approaching closer than 60 feet to any dwelling on adjacent property.

Mr. Gazdag noted that some persons in the audience had raised their hands. He noted that Dr. Gillette had been allowed to speak. In response to a question from the Chairman, the Township Attorney indicated that it rested within the discretion of the Chairman and the Commission whether to reopen this matter for public comment. The Chairman indicated that he declined to do so. A vote was then held on the motion as amended and the motion passed by a vote of five to one, with Mr. Betz voting in the negative and Ms. Shannon abstaining.

Dr. Gillette indicated that before this meeting goes off the record, he wished to indicate that he is planning to appeal this decision. He inquired of the Township Attorney whether the Township Attorney would stipulate that this meeting constitutes a final decision for purposes of appeal of the Planning Commission and Zoning Board of Appeals'

actions with respect to the Stucki special exception use request.

Mr. Walton indicated that he would oppose such a stipulation. He indicated that the special exception permit for a private stable and the Zoning Board of Appeals' actions were separate from the special exception approval action taken at this meeting. Dr. Gillette indicated that he was still within the timeline for appealing by right with respect to this decision. He indicated that the alternative would be for him to file an application for leave to appeal.

The Township Attorney noted that there had been a recent Court of Appeals decision indicating that the time for taking an appeal began running from the date the minutes of the meeting were approved, but that he could not serve as Dr. Gillette's attorney and Dr. Gillette should check with his own attorney regarding this. The Township Attorney indicated that he was not willing to enter into any stipulations at this meeting. He indicated that if Dr. Gillette wished to contact him subsequent to this meeting and request specific stipulations and permit him the opportunity to confer with his client regarding the same, he would be willing to consider such a request.

Mr. Jones noted that this request was not pertinent to the business of the Planning Commission and moved that the meeting be adjourned. The motion was seconded and passed unanimously.

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF KALAMAZOO

GARY L. GILLETTE, D.V.M.,
Petitioner/Appellant, File No. B 95-3152 AA

v

MARCIA V. STUCKI,
Defendant.

ORDER

At a session of said Court held in the City and County of Kalamazoo, State of Michigan on this 13th day of March, 1996.

PRESENT: HON. JOHN F. FOLEY

The Court having reviewed all motions, and the respective supporting and responsive briefs filed by the parties, and having heard argument in open court, and being otherwise advised;

IT IS HEREBY ORDERED for the reasons stated on the record:

1. Appellant, Gary L. Gillette, DVM's (hereinafter "Gillette") Application for Leave to File a Delayed Petition for Review of the Special Exception Use Permit granted to Marcia V. Stucki (hereinafter "Stucki") by the Comstock Charter Township Planning Commission on August 24, 1995, for a private stable is denied, and the appeal of the same is dismissed;

2. The Court has not made the express determination that the above-described dismissal is a final judgment. It is the determination of this Court that the above-described dismissal is not a final judgment from which an appeal must be taken from this date;

3. Gillette's Motion for an Order of Superintending Control is denied;

4. Gillette's Motion for Stay of Enforcement is denied;

5. Gillette's Application to Present Proofs of Irregularity in Procedure and Civil Rights Violations is denied, without prejudice to the right of Gillette to bring before the Court at a future time in this litigation a request to add to the record pursuant to MCLA 125.293a, as amended;

6. Gillette's Application to Allow the Taking of Additional Evidence Before the Court, if Necessary, is denied, without prejudice to the right of Gillette to bring before the Court at a future time in this litigation a request to add to the record pursuant to MCLA 125.293a, as amended;

7. Respondent-Appellee, Stucki's Motion to Dismiss (with the exception of the appeal of the permit for a private stable which was addressed in Paragraph 1 above) is denied without prejudice; and

8. Gillette's Motion for Peremptory Reversal is denied, without prejudice to the right of Gillette to bring this before the Court at a future time in this litigation.

IT IS FURTHER ORDERED that the parties shall agree upon a date for oral argument of the Petition for Review of the October 24, 1995, decisions and/or determinations of the Charter Township of Comstock Zoning

Board of Appeals, and the decisions and/or determinations of the Charter Township of Comstock Planning Commission, entered on October 26, 1995, and that each party submit any brief at least two (2) weeks prior to such mutually agreeable date.

(signature)
Hon. John F. Foley
Circuit Court Judge

APPROVED AS TO FORM AND CONTENT

/s/ Ross E. Chapman
Attorney for Petitioner/Appellant

/s/ Garry L. Walton
Attorney for Respondent/Appellee

/s/ Kenneth C. Sparks
Attorney for Comstock Charter Township Planning Commission and Comstock Charter Township Zoning Board of Appeals

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF KALAMAZOO

GARY L. GILLETTE, D.V.M.,
Petitioner/Appellant,

v

File No. B95-3152 AA

MARCIA V. STUCKI,
Respondent/Appellee,

and

COMSTOCK CHARTER
TOWNSHIP PLANNING
COMMISSION and ZONING
BOARD OF APPEALS,
Respondents/Appellees.

Order for Preliminary Injunction, Scheduling, and Other Matters

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At a session of Court held in the City and County of Kalamazoo, Michigan on this 5th day of December, 1996.

[Present:] Honorable John F. Foley,
Circuit Judge

This court, having reviewed the various petitions and motions filed by the parties and having had extensive conversation with counsel in chambers, enters an Order pursuant to Stipulation, that the Respondent/Appellee MARCIA V. STUCKI shall be preliminarily enjoined from adding to the number or species of animals located on her property, as of December 8, 1995, at 2088 South 36th Street, Galesburg, Michigan, 49053 until further order of the court.

IT IS FURTHER ORDERED that the court shall decide the issues presented in the Petitioner/Appellant's appeal before it decides the remaining issues presented in Petitioner's Petition For Injunctive Relief, Damages, and Attorney Fees and Respondents' motion filed in response to that petition.

IT IS FURTHER ORDERED that if the videotapes of the proceedings below are to be made a part of the appeal, they must be filed, and copies provided to Respondents, within 14 days.

IT IS FURTHER ORDERED that the briefing schedule for the petitioner's appeal shall be as follows:

1. Petitioner/Appellant shall file his appellant's brief within 60 days.
2. The Respondents/Appellees shall file their brief or briefs within 30 days of receipt of Petitioner/Appellant's brief.
3. The Petitioner/Appellant may, if he chooses to do so, file a reply brief within 14 days of receipt of the last of the Respondent / Appellees' briefs.

IT IS FURTHER ORDERED that the parties shall set oral argument on this matter on March 14, 1997 at 1:30 p.m., or as soon thereafter as counsel may be heard.

IT IS FURTHER ORDERED that all remaining issues raised in the motions and the petitions that have been filed shall be reserved until this court rules on the appeal.

(signature)
Hon. John F. Foley
Circuit Court Judge

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF KALAMAZOO

GARY L. GILLETTE,
Petitioner/Appellant File No. B 95-3152-AA

v

MARCIA V. STUCKI, ET AL,
Respondents/Appellees.

OPINION AND ORDER DENYING MOTION TO DISMISS PETITION FOR INJUNCTIVE RELIEF, DAMAGES AND ATTORNEY FEES

At a session of said Court held in the City and County of Kalamazoo, MI, on this 29th day of April, 1998.

Present: Honorable John F. Foley

Defendant Marcia Stucki has filed a Motion to Dismiss Petition for Injunctive Relief, Damages and Attorney Fees and a brief, and the Plaintiff has filed an answer and brief and Defendant Comstock Charter Township has filed a brief.

On October 18, 1996, the parties stipulated to an Order which provided that Marcia V. Stucki would not add to the number of species of animals located on her property until further order of the Court and specified deferral of the resolution on the Petition for Injunctive Relief and Damages and Attorney Fees as follows:

> It is further Ordered that the Court shall decide the issues presented on the Petitioner/Appellant's Appeal before it decides the remaining issues presented in Petitioner's Petition for Injunctive Relief, Damages and Attorney Fees and Respondents (sic) Motion filed in response to that Petition.

On May 5, 1997, this Court ruled on all issues except the Petition for Injunctive Relief, Damages and Attorney Fees, and this Court entered a Judgment on December 29, 1997.

On January 13, 1998, Petitioner filed an Application for leave to Appeal in the Court of Appeals.

I shall decide the remaining issues presented in Petitioner's Petition for Injunctive Relief, Damages and Attorney Fees after a decision by the Court of Appeals on the application for leave to appeal or on an appeal if the application is granted.

THEREFORE, the Motion to Dismiss Petition for Injunctive Relief, Damages and Attorney Fees is denied.

(signature)
John F. Foley

Court of Appeals, State of Michigan

ORDER

Gary L Gillette D.V.M. v Marcia V Stucki

Docket No. 208923

LC No. 95-003152 AA

Robert P. Young, Jr.
Presiding Judge

Harold Hood
Martin M. Doctoroff
Judges

The Court orders that the motion to strike the appellees' briefs for nonconformity is DENIED.

The motion for peremptory reversal is DENIED for failure to persuade the Court of the existence of manifestly reversible error warranting peremptory relief.

The application for leave to appeal is DENIED for lack of merit in the grounds presented.

A true copy entered and certified by Carl L. Gromek, Chief Clerk, on July 29, 1998.

(signature)
Chief Clerk

Court of Appeals, State of Michigan

ORDER

Gary L. Gillette DVM v Marcia V. Stucki

Robert P. Young, Jr.
Presiding Judge

Docket No. 208923

Harold Hood
Martin M. Doctoroff
Judges

LC No. 95-003152

The Court orders that the motion for rehearing is DENIED.

A true copy entered and certified by Carl L. Gromek, Chief Clerk, on September 29, 1998.

(signature)
Chief Clerk

Order

Michigan Supreme Court
Lansing, Michigan

113325

GARY L. GILLETTE, D.V.M.,
Plaintiff-Appellant,
v

MARCIA V. STUCKI,
Defendant-Appellee,

and

COMSTOCK CHARTER TOWNSHIP PLANNING COMMISSION and ZONING BOARD OF APPEALS,
Defendants-Appellees.

SC: 113325
COA: 208923
[9th Circuit Court:]
95-003152-AA

On order of the Court, the application for leave to appeal from the July 29, 1998 decision of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court. Young, Jr., J., not participating.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

Entered: May 25, 1999 (signature)

Order

Michigan Supreme Court
Lansing, Michigan

113325 (36)

GARY L. GILLETTE,
Plaintiff-Appellant

v

MARCIA V. STUCKI,
Defendant-Appellee,

SC: 113325
COA: 208923
[9th Circuit Court:]
95-003152-AA

and

COMSTOCK CHARTER TOWNSHIP PLANNING COMMISSION and ZONING BOARD OF APPEALS,
Defendants-Appellees.

On order of the Court, the motion for reconsideration of this Court's order of May 25, 1999 is considered, and it is DENIED, because it does not appear that the order was entered erroneously. Young, Jr., J., not participating.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

Entered: August 31, 1999 (signature)

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF KALAMAZOO

GARY L. GILLETTE, D.V.M,
Petitioner/Appellant,

v

Hon. Philip D. Schaefer

MARCIA V. STUCKI,
Respondent/Appellee, File No. D 95-3152-AA

and

COMSTOCK CHARTER TOWNSHIP
PLANNING COMMISSION and
COMSTOCK CHARTER TOWNSHIP
ZONING BOARD OF APPEALS,
Respondents/Appellees.

Order Dismissing Comstock Charter Township Planning Commission And Comstock Charter Township Zoning Board Of Appeals, Only

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At a session of said Court held in the Courthouse, City and County of Kalamazoo, State of Michigan, on the 28th day of December, 1999

Present: Honorable Philip D. Schaefer
Circuit Judge

Upon the parties placing a Stipulation to Dismiss the case and claims of the Petitioner against Comstock Charter

Township Planning Commission and Comstock Charter Township Zoning Board of Appeals without prejudice, without interest and without costs on the record on October 11, 1999, and the Court being fully advised in the premises;

NOW, THEREFORE, IT IS HEREBY Ordered and Adjudged that the case and claims of the Petitioner against Comstock Charter Township Planning Commission and Comstock Charter Township Zoning Board of Appeals, may be, and are hereby, dismissed without prejudice, without interest and without costs.

William G. Schma
for Philip D. Schaefer
Circuit Judge

IN THE MICHIGAN COURT OF APPEALS

ORDER

Re: Gary L Gillette DVM v Marcia V Stucki
Docket No. 240200
L.C. No. 95-003152-AA

William C. Whitbeck, Chief Judge, acting under MCR 7.203(F)(1) and 7.216(A)(10), orders:

The delayed application for leave to appeal filed March 19, 2002, and the motion to consolidate, as it pertains to consolidation of this delayed application with the two claims of appeal filed, are DISMISSED for lack of jurisdiction because appellant failed to file the application within 12 months of the date of entry for the December 23, 1997 order as required by MCR 7.205(F)(3). Under the facts of this particular case, the Court concludes that the decision on the merits as that term is used in MCR 7.205(F)(3) was the December 23, 1997 decision. As such, this application is untimely. This decision is consistent with how this Court treated the application for leave to appeal filed by the plaintiff in docket number 208923. This Court did not treat that application as an interlocutory application. Instead, this Court reviewed the merits of the issues raised and denied the application for leave to appeal for lack of merit in the grounds presented.

(signature of William C. Whitbeck)

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on April 8, 2002.

(signature)

Court of Appeals, State of Michigan

ORDER

Gary L Gillette DVM v Marcia V Stucki

Docket No. 240200

LC No. 95-003152-AA

E. Thomas Fitzgerald
Presiding Judge

Harold Hood
Martin M. Doctoroff
Judges

The Court orders that the motion for rehearing is DENIED. The legal authority cited by appellant does not involve a factual situation where a party attempted to combine an administrative appeal, for which there would never be an appeal of right to this Court, with monetary damages in a single document with the party then attempting to use this combined document to appeal a second time the decision made on the administrative appeal, a decision that this Court has already reviewed and concluded that the appellant's appeal lacks merit in the grounds presented.

(signature)
Presiding Judge

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on May 29, 2002.

(signature)

Order

Michigan Supreme Court

Lansing, Michigan

121801

GARY L. GILLETTE, D.V.M.,
Petitioner-Appellant,

SC: 121801
COA: 240200
[9th Circuit Court:]
95-003152-AA

v

MARCIA V. STUCKI
Respondent-Appellee

and

COMSTOCK CHARTER TOWNSHIP
PLANNING COMMISSION and
ZONING BOARD OF APPEALS,
Respondents.

On order of the Court, the application for leave to appeal from the April 8, 2002 decision of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

Entered: December 30, 2002 (signature)

US Constitution

Fourteenth Amendment, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Michigan Constitution of 1963
(Effective Date: January 1, 1964)

Article I, Section 2. Equal protection; discrimination.

No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation.

Article I, Section 17. Self-incrimination; due process of law; fair treatment at investigations.

No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.

Article III, Section 2. Separation of powers of government.

The powers of government are divided into three branches; legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

Article VI, Section 28. Administrative action, review.

All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. Findings of fact in workmen's compensation proceedings shall be conclusive in the absence of fraud unless otherwise provided by law.

In the absence of fraud, error of law or the adoption of wrong principles, no appeal may be taken to any court from any final agency provided for the administration of property tax laws from any decision relating to valuation or allocation.

Michigan Compiled Laws

MCL 125.286e. Site plan; submission and approval; record; procedures and requirements; compliance [Embodied within the Township Zoning Act (TZA) - Public Act 184 of 1943, as amended]

Sec. 16e.

(1) As used in this section, "site plan" includes the documents and drawings required by the zoning ordinance to insure that a proposed land use or activity is in compliance with local ordinances and state and federal statutes.

(2) A township may require the submission and approval of a site plan before authorization of a land use or activity regulated by a zoning ordinance. The zoning ordinance shall specify the body, board, or official charged with reviewing site plans and granting approval.

(3) If a zoning ordinance requires site plan approval, the site plan, as approved, shall become part of the record of approval, and subsequent actions relating to the activity authorized shall be consistent with the approved site plan, unless a change conforming to the zoning ordinance receives the mutual agreement of the landowner and the individual or body which initially approved the site plan.

(4) The procedures and requirements for the submission and approval of site plans shall be specified in the zoning ordinance. Site plan submission, review, and approval shall be required for special land uses and planned unit developments. Decisions rejecting, approving, or conditionally approving a site plan shall be based upon requirements and standards contained in the zoning

ordinance, other township planning documents, other applicable ordinances, and state and federal statutes.

(5) A site plan shall be approved if it contains the information required by the zoning ordinance and is in compliance with the zoning ordinance and the conditions imposed pursuant to the ordinance, other township planning documents, other applicable ordinances, and state and federal statutes.

(6) The purpose of this amendatory act is to clarify the authority of the township body, board, or official charged with reviewing site plans and granting approval of site plans, which is implied from the language of this act, but which is not specifically set forth in this act.

COMSTOCK TOWNSHIP ORDINANCE NO. 156

Adopted: November 1, 1976
Effective: January 1, 1977

An Ordinance to Provide for the establishment of zoning districts in the unincorporated portions of Comstock Township within which districts the use of land for agriculture, forestry, recreation, residence, industry, trade, soil conservation, water supply conservation and additional uses of land are encouraged, regulated or prohibited, and to divide unincorporated portions of Comstock Township into districts of a certain number, shape and area as may have been deemed best suited to carry out the provisions of 1943 PA 184, as amended; to adopt provisions designating or limiting the location, height, number of stories, and size of dwellings, buildings and structures that may hereafter be erected or altered, including tents and trailer coaches, and the specific uses for which dwellings, buildings and structures, including tents and trailer coaches may hereafter be erected or altered; to provide the area of yards, courts, and other open spaces, and the sanitary, safety and protective measures that shall be required for such dwellings, buildings and structures, including tents and trailer coaches; to provide for the maximum number of families which may be housed in buildings, dwellings and structures, including tents and trailer-coaches, hereafter erected or altered; to provide for penalties for violation of said ordinance and to repeal all ordinances or parts of ordinances in conflict herewith.

THE TOWNSHIP OF COMSTOCK, KALAMAZOO COUNTY, MICHIGAN ORDAINS:

Article 1.00 - Title, Purpose And Enabling Authority

Section 1.01. TITLE. This Ordinance shall be known and cited as the Comstock Township Zoning Ordinance.

Section 1.02. PURPOSE. An Ordinance to establish zoning districts within the unincorporated portions of the Township of Comstock, Kalamazoo County, Michigan, to regulate and encourage or prohibit certain uses of the land therein; and to provide for the administration, enforcement, and penalties for the violation thereof.

Section 1.03. ENABLING AUTHORITY. This Ordinance is adopted pursuant to Act 184 of the Public Acts of 1943 of the State of Michigan, as amended. Said Act, covering Township Rural Zoning, is hereby made a part of this Ordinance just as if said Act were repeated verbatim herein.

Section 1.04. ENACTMENT. The provisions of this Ordinance are hereby declared to be immediately necessary for the preservation of the public peace, health, safety, and welfare of the people of the Township of Comstock, Kalamazoo County, Michigan, and are hereby ordered to be given immediate effect from and after the date of its passage by the Township Board and subsequent publication as required by law.

***

Section 4.13 USES PERMITTED UNDER SPECIAL EXCEPTION: The uses identified as special exceptions uses in Articles 9.00 through and including 20.00 are recognized as possessing characteristics of such unique and special nature (relative to location design, size, public utility needs, and other similar characteristics) as necessitating individual standards and conditions in order to safeguard the general health, safety, and welfare of the community.

a) Petitions for the grant of special exceptions shall be filed with the Township Clerk on forms provided therefore. The petitioner shall submit plans and

specifications or other data or exploratory material stating the methods by which he will comply with the conditions specified for each grant of special exception. At the time of filing the request for a grant of special exception, the petitioner shall pay to the Clerk the fee required to cover the cost of advertising and of sending notices and other miscellaneous expenses in connection with this petition.

b) The Planning Commission shall review and decide all applications for approval of special exception uses and shall, on its own initiative, hold a public hearing after giving notice as required herein. Upon fixing the date for the public hearing, a notice that a request for special exception use approval has been received shall be published in the newspaper circulated within the Township and shall be sent by mail or personal delivery to the owners of property for which approval is being considered, to all persons to whom real property is assessed within 300 feet of the boundary of the property in question, and to the occupants of all structures within 300 feet. The notice shall be given not less than five nor more than 15 days before the date of the public hearing. If the name of the occupant is not known, the term "Occupant" may be used in making notification. The notice shall:

1) Describe the nature of the special exception use request.
2) Indicate the property which is the subject of the special exception use request.
3) State when and where the special exception use request will be considered.
4) Indicate when and where written comment will be received concerning the request.

At the conclusion of the public hearing, the Planning Commission may deny, approve, or approve with condition, a request for special exception use approval. The decision on a special exception use request shall be incorporated in a

statement containing the conclusions relative to the special exception use under consideration which specifies the basis for the decision and any conditions imposed.

c) In hearing a request for any special exception, the Planning Commission shall be governed by the following principles and conditions:

1) The applicant for a special exception shall have the burden of proof, which shall include the burden of going forward with the evidence and the burden of persuasion on all questions of fact which are to be determined by the Commission.

2) A special exception may be granted when the Planning Commission finds from the evidence produced at the hearing that:

a) The proposed use does not affect adversely the General Plan for physical development of the Township as embodied in this ordinance and in any Master Plan or portion thereof adopted by the Township; and

b) The proposed use will not affect adversely the health and safety of residents or workers in the area and will not be detrimental to the use or development of adjacent properties or the general neighborhood; and

c) The standards as may be set forth for a particular use for which a special exception may be granted, can and will be met by the applicant; and

d) The proposed use is compatible with the natural environment and the capacities of public services and facilities affected by the proposed use.

Article 22.00 – Site Plan Review Procedures

Section 22.01. SCOPE. The intent of this Article is to provide for consultation and cooperation between land developers and the Township in order that the developer may accomplish his or her objectives in the utilization of his or her land within the regulations of this zoning ordinance and with minimum adverse effect on the use of adjacent streets and highways and on existing and future uses in the immediate area and vicinity. Prior to the issuance of a building permit, to the creation of a use or the erection of a building in the district and under the conditions cited below, a site plan shall be submitted in accordance with this Article to the Planning Commission for approval. Site plans shall be required for the following uses and related development ***to be created*** [future tense; emphasis added by Petitioner] in the following districts:

Section 22.01.1 FOR PERMITTED AND SPECIAL EXCEPTION USES IN:

a) Cluster Housing District.
b) Multiple-Family Residential District.
c) Mobile Home Park District, excluding mobile home parks and mobile homes.
d) Office District.
e) All Business Districts.
f) All Manufacturing Districts.

Section 22.01.2 FOR SPECIAL EXCEPTION USES IN:

a) Agricultural-Residential District.
b) Agricultural-Horticultural District.
c) Single-Family Residential Districts.
d) Open Wetlands District.

***

Michigan Court Rules
[Current as of April 30, 2005]

Subchapter 1.100 – Applicability; Construction

MCR 1.103 - Applicability

The Michigan Court Rules govern practice and procedure in all courts established by the constitution and laws of the State of Michigan. Rules stated to be applicable only in a specific court or only to a specific type of proceeding apply only to that court or to that type of proceeding and control over general rules.

Subchapter 1.200 – Amendment of Michigan Court Rules

MCR 1.201 - Amendment Procedure

(A) **Notice of Proposed Amendment.** Before amending the Michigan Court Rules or other sets of rules within its jurisdiction, the Supreme Court will notify the secretary of the State Bar of Michigan and the state court administrator of the proposed amendment, and the manner and date for submitting comments. The notice also will be posted on the Court's website, www.supremecourt.state.mi.us.

Subchapter 2.600 – Judgments And Orders; Postjudgment Proceedings

MCR 2.604 - Judgment in Actions Involving Multiple Claims or Multiple Parties

(A) Except as provided in subrule (B), an order or other form of decision adjudicating fewer than all the claims, or the rights and liabilities of fewer than all the parties, does not terminate the action as to any of the claims or parties, and the

order is subject to revision before entry of final judgment adjudicating all the claims and the rights and liabilities of all the parties. Such an order or other form of decision is not appealable as of right before entry of final judgment. A party may file an application for leave to appeal from such an order.

(B) In receivership and similar actions, the court may direct that an order entered before adjudication of all of the claims and rights and liabilities of all the parties constitutes a final order on an express determination that there is no just reason for delay.

Subchapter 7.200 – Court Of Appeals

MCR 7.202 – Definitions

For purposes of this subchapter:

***

(6) "final judgment" or "final order" means:

(a) In a civil case,

(i) the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment or order,

(ii) an order designated as final under MCR 2.604(B),

(iii) in a domestic relations action, a post-judgment order affecting the custody of a minor,

(iv) a post-judgment order awarding or denying attorney fees and costs under MCR 2.403, 2.405, 2.625 or other law or court rule,

(v) An order denying governmental immunity to a governmental party, including a governmental agency, official, or employee;

(b) In a criminal case [**not applicable here**] ***

MCR 7.211 - Motions in Court of Appeals

(A) Manner of Making Motion. ***

(B) Answer. ***

(C) Special Motions. If the record on appeal has not been sent to the Court of Appeals, except as provided in subrule (C)(6), the party making a special motion shall request the clerk of the trial court or tribunal to send the record to the Court of Appeals. A copy of the request must be filed with the motion.

(1) *Motion to Remand* ***

(2) *Motion to Dismiss* ***

(3) *Motion to Affirm* ***

(4) *Motion for Peremptory Reversal.* The appellant may file a motion for peremptory reversal on the ground that reversible error is so manifest that an immediate reversal of the judgment or order appealed from should be granted without formal argument or submission. The decision to grant a motion for peremptory reversal must be unanimous. An

order denying a motion for peremptory reversal may identify the judge or judges who would have granted it but for the unanimity requirement of this subrule. ***

Rule 7.215 Opinions, Orders, Judgments, and Final Process From Court of Appeals

(A) Opinions of Court. An opinion must be written and bear the writer's name or the label "per curiam" or "memorandum" opinion. An opinion of the court that bears the writer's name shall be published by the Supreme Court reporter of decisions. A memorandum opinion shall not be published. A per curiam opinion shall not be published unless one of the judges deciding the case directs the reporter to do so at the time it is filed with the clerk. A copy of an opinion to be published must be delivered to the reporter no later than when it is filed with the clerk. The reporter is responsible for having those opinions published as are opinions of the Supreme Court, but in separate volumes containing opinions of the Court of Appeals only, in a form and under a contract approved by the Supreme Court.

(B) Standards for Publication. A court opinion must be published if it:

(1) establishes a new rule of law;

(2) construes a provision of a constitution, statute, ordinance, or court rule;

(3) alters or modifies an existing rule of law or extends it to a new factual context;

(4) reaffirms a principle of law not applied in a recently reported decision;

(5) involves a legal issue of continuing public interest;

(6) criticizes existing law; or

(7) creates or resolves an apparent conflict of authority, whether or not the earlier opinion was reported; or

(8) decides an appeal from a lower court order ruling that a provision of the Michigan Constitution, a Michigan Statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branch of state government is invalid.

(C) Precedent of Opinions.

(1) An unpublished opinion is not precedentially binding under the rule of stare decisis. A party who cites an unpublished opinion must provide a copy of the opinion to the court and to opposing parties with the brief or other paper in which the citation appears.

(2) A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis. The filing of an application for leave to appeal to the Supreme Court or a Supreme Court order granting leave to appeal does not diminish the precedential effect of a published opinion of the Court of Appeals.

***

(J) Resolution of Conflicts in Court of Appeals Decisions.

(1) Precedential Effect of Published Decisions. A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule.

(2) Conflicting Opinion. A panel that follows a prior published decision only because it is required to do so by subrule (1) must so indicate in the text of its opinion, citing this rule and explaining its disagreement with the prior decision. The panel's opinion must be published in the official reports of opinions of the Court of Appeals.

Subchapter 7.300 – Supreme Court

Rule 7.302 - Application for Leave to Appeal

(A) What to File. To apply for leave to appeal, a party must file: ***

(B) Grounds. The application must show that

(1) the issue involves a substantial question as to the validity of a legislative act;

(2) the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity;

(3) the issue involves legal principles of major significance to the state's jurisprudence;

(4) in an appeal before decision by the Court of Appeals,

> (a) delay in final adjudication is likely to cause substantial harm, or
>
> (b) the appeal is from a ruling that a provision of the Michigan Constitution, a Michigan Statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branch of state government is invalid;

(5) in an appeal from a decision of the Court of Appeals, the decision is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals; or

(6) in an appeal from the Attorney Discipline Board, the decision is erroneous and will cause material injustice.

STATE OF MICHIGAN
IN THE COURT OF APPEALS

GARY L. GILLETTE, D.V.M.,
Appellant, Plaintiff

v

COMSTOCK TOWNSHIP, a Michigan Charter Township	COA No. 240198 LC No. 00-0135-CZ
and	
MARCIA V. STUCKI, Appellees/Defendants.	COA No. 240199 LC No. 95-3152-AA

APPELLANT'S MOTION FOR REHEARING OF OPINION DATED FEBRUARY 3, 2004

The appellant, pursuant to MCR 7.215(H)(1), moves the Court for rehearing of its February 3, 2004 opinion in these consolidated cases. A copy of the opinion is attached as Ex 1. In support of this motion, appellant says:

[Petitioner's Note: The text shown below has been reproduced verbatim from p 9 of this document]:

IV. The Court's Failure To Review Many Of The Properly-Preserved Issues Advanced In Appellant's Briefs Violates Appellant's Right To Due Process

This Court is obligated to review properly preserved issues. *Shields v Shell Oil Co,* 237 Mich App 682, 687; 604 NW2d 719 (1999); rev'd on other grounds, 463 Mich 939

(2000). An issue is properly preserved if it is raised in the trial court and pursued on appeal, even if the trial court fails to address or decide the issue. *Peterman, supra* at 183.

This Court failed to address many of the properly preserved issues advanced in both briefs appellant filed.[16] Nor did the Court set forth the standards of review that applied to the issues it did address.[17] The Court's failure to do so raises serious due process questions, since appellant's constitutionally-protected property rights could be stripped from him without these important matters being addressed.[18]

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16 Issues I(A)(B) & (D), plus issues II, III, & IV in their entirety in 240199--plus issues I, II, & IV in their entirety in 240198--were all ignored by the Court.

17 The only standard of review advanced in the Court's 12 page opinion (Ex 1) is found on p 6, ¶ 1. While this standard of review is the correct one for many of the issues that were advanced by all sides, it is hardly the only standard that applied in these cases. See, in particular, p 7-13, 27, & 41, as well as p 10-31 & 41-42 in appellant's briefs in Docket Nos. 240199 and 240198, respectively...all of which the Court ignored.

18 See Const 1963, art I, §17 and US Const, 14th Amendment, § 1.

STATE OF MICHIGAN
IN THE SUPREME COURT

GARY L. GILLETTE, D.V.M., Appellant/Plaintiff	Supreme Court No. 126021
v	
COMSTOCK TOWNSHIP, a Michigan Charter Township	COA No. 240198 LC No. 00-0135-CZ
and	
MARCIA V. STUCKI, Appellees/Defendants.	COA No. 240199 LC No. 95-3152-AA

Appellant's Application For Leave To Appeal
**** Oral Argument Requested ****

[Petitioner's Note: The text shown below has been reproduced verbatim from p 47-50 of this document.]

Summary

As set forth in detail, above, the appellate panel did all of the following while reviewing the lower court's decision in these cases:

1. Misstated (and rather blatantly too) the root question in the Stucki case, which was correctly advanced by both the trial court and appellant;

2. Completely ignored (and refused to follow, even after appellant expressly and repeatedly reminded the panel that it

was required to do so) both *Carleton* and *Northville, supra,* thereby overruling and/or ignoring their holdings; [46]

3. Completely ignored (and refused to enforce) the facially-unambiguous provisions of MCL 125.286e(1)(3)(4) and MCL 125.294--plus zoning ordinance Sections 4.13(a), 4.13(C)(2)(c), 22.01, and 29.03, which are the corollaries of these statutory provisions--thereby rendering these statutory and ordinance provisions surplusage and nugatory, which a court may not do;

4. Completely ignored (and refused to comply with) the facially-unambiguous provisions of MCR 7.215(B)(1)(2)(3) and (7) and MCR 7.215(J)(1), thereby rendering these Court Rules surplusage and nugatory, which a court may not do;

5. Made numerous impermissible "findings," including that Stucki's post-SEUP-approval livestock "constituted a nonconforming use," which "finding" flies squarely in the face of the proofs demonstrating the complete opposite, which proofs estopped Stucki from launching this frivolous "defense;" [47]

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46 See also *Boyd v W.G. Wade Shows,* 443 Mich 515, 523; 505 NW2d 544 (1993), which reiterates this Court's long-standing "must follow" rule with respect to directly on point decisions of this Court, which *Northville* (decided on 7-31-03, only 10 months ago) certainly is with respect to the non-finality of a site plan decision for a proposed land use.

47 The original jurisdiction of the Court of Appeals is limited by MCR 7.206(A-E), no section of which permits a panel of that court to render nonconforming use decisions that are properly within the jurisdiction of a ZBA, particularly when the appellate court is sitting as a court of review, as was the case here. Accordingly, this portion of the panel's decision is also void on subject matter jurisdiction grounds. See *Fox v U of M Board of Regents* and *Bowie v Arder, supra.*

6. Completely ignored the Township's admission that appellant had, indeed, pled a valid taking claim, and also ignored this Court's holding in *Peterman, supra,* which sets forth the current view of what constitutes a taking; and

7. Abused its discretion in upholding the trial court's denial of leave to amend.

Why These Cases Should Be Reviewed By This Court

It is hard to fathom that an appellate court would commit the sheer number of errors, let alone the serious ones enumerated above, that were made in deciding these cases. From all outward appearances, the panel was on some sort of "mission." No "mission," however, can possibly justify what the court did here: blatantly ignoring unambiguous court rules, statutes, ordinances, and binding case law, all of which it was required to adhere to, enforce, and/or follow. In accomplishing its "mission," the court simultaneously abrogated appellant's due process and property rights, which are clearly inter-connected in these cases. Such actions are not only constitutionally impermissible, they are also constitutionally repugnant.[48]

Pursuant to MCR 7.302(B)(5), appellant was required to demonstrate that the Court of Appeals decision is clearly erroneous and will cause a material injustice, or that it conflicts with another decision of either that court or this Court. He clearly did so--on both counts--and the case law conflicts enumerated above are almost too numerous to count.[49]

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48 See US Const, 5th & 14th Amendments; Const 1963, art I, § 17.

49 The material injustice that will result should also be obvious, i.e., appellant has been forced to spend tens of thousands of dollars of his own money over the past nine years to enforce unambiguous laws the Township was required to enforce...which it has blatantly refused to

This case also falls squarely within the ambit of MCR 7.302(B)(3), because another important question is whether this Court will permit a Court of Appeals panel to completely ignore (or rewrite, as it did here) many of the bedrock legal principles that this Court has established and rigorously enforced over the past 150 years, as enumerated in detail above. If this Court permits an intermediate appellate panel to do so, then the law is no longer worth the paper it is printed on, and we might just as well return to gunfights in the street at high-noon to resolve our differences.

Relief Requested

Appellant requests that, in lieu of granting leave, and under MCR 7.302(G)(1), this Court:

1. Reverse, either by peremptory order or per curiam decision, the grant of summary disposition to appellee Comstock Township in Court of Appeals Docket No 240198, with remand to the trial court for further proceedings.[50]

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enforce...but which it has, instead, spent tens of thousands of taxpayer dollars seeking to have nullified. It has done so in order to allow Stucki to have a pig farm on her single-family, residentially-zoned property--only *80 feet* from appellant's directly-abutting, single-family, residentially-zoned master bedroom window--when the zoning ordinance mandates setbacks of more than three times that distance from all residence dwellings (including Stucki's) when such uses are permitted by SEUP approval in single-family, residentially-zoned districts. The Township has also refused to abate the statute and ordinance-defined per se nuisances that it assisted Stucki in creating. If this does not constitute a "material injustice," then appellant cannot possibly imagine what might.

50 Appellant recognizes, as this Court probably does too, that his taking claim against the Township will reduce itself to a "temporary taking," at best, with a correct resolution of the Stucki case, which claim appellant would probably be disinclined to pursue further on remand. →

2. Reverse, either by peremptory order or per curiam decision, the grant of summary disposition to appellee Stucki in Court of Appeals Docket No 240199; grant summary disposition to appellant instead; and remand to the trial court for a determination of appellant's damages. Appellant further requests that this Court's order or decision instruct the trial court directly, or as this Court did recently in *Soupal v Shady View, Inc,* 469 Mich 458; 672 NW2d 171 (2003), to abate the livestock-keeping, per se nuisances that Stucki has been maintaining on her property since at least 1995. [51]

In the alternative, appellant requests that this Court grant leave to appeal. However, given the clear-cut nature of the errors, and the wholly-unsustainable decisions that have been made at both the trial court and intermediate appellate levels, appellant believes that granting leave would be an un-

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Therefore, a correct resolution of the Stucki case, which is what appellant has sought first and foremost for nine years running, would probably resolve a lot of other issues and problems simultaneously.

51 *Soupa,* which was decided by unanimous per curiam decision only four months ago (on 12-11-03), has many striking similarities to the Stucki case, including (as here) an unpublished Court of Appeals decision that construed several ordinance provisions (although that defect was not specifically addressed by this Court in its decision) and, more importantly, an ordinance-defined nuisance per se, with failure of the trial and appellate courts to enforce the unambiguous mandate of the statute requiring abatement of the nuisance--which this Court did enforce. See *Soupal* at 464-466. See also *Charter Twp of Oshtemo v Central Advertising Co,* 125 Mich App 538, 540-541; 336 NW2d 823 (1983), cited repeatedly by appellant over the past nine years, wherein a billboard nuisance per se was abated in its entirety because, *inter alia,* Central Advertising failed to seek and receive site plan review and approval before creating its billboard use, just as Stucki did here with her livestock-keeping SEUP uses. The Court may, in fact, wish to thoroughly review pgs 31-34 (as well as Ex 16-18) in appellant's Brief on Appeal in 240199--where *Oshtemo* was discussed at length--because the Court might be very surprised when it sees who else was involved in this case.

warranted, unnecessary, and inefficient use of this Court's time and resources.

(signature)
Dated: April 23, 2004 Kenneth A Rathert (P26335)
Attorney for Appellant Gillette

STATE OF MICHIGAN
IN THE SUPREME COURT

GARY L. GILLETTE, D.V.M.,
Appellant/Plaintiff,

v

MARCIA V. STUCKI,
Appellee/Defendant

Supreme Court No. 126021
COA No. 240199
LC No.95-3152-AA

Appellant's Motion For Reconsideration Of Order Denying Leave To Appeal

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[Petitioner's Note: The text below has been reproduced verbatim from p 1, 2, and 6-10 of this document.]

The appellant, pursuant to MCR 7.313(E), moves the Court for reconsideration of its October 25, 2004 order (Ex 1, attached), which denied appellant's *alternative* request for relief, while simultaneously ignoring his *principal* request for relief. See Appellant's Application For Leave To Appeal, p 50, point 2. In support of this motion, appellant says:

Grounds For Reconsideration

1. Appellant bases this motion on the most simplistic, fundamental, and important legal grounds that could ever be advanced to this Court, In short, the Court of Appeals decision in this case (Ex 2, attached, p 9-12), which this Court is sanctioning by refusing to do anything to correct it (at least thus far):

A. Blatantly rendered MCL 125.286e (1) & (3) surplusage and nugatory by ignoring them, which this Court has repeatedly held that no Michigan court may do. The court did so even though § 1 of this statute is unambiguously definitional, and even though it unambiguously states the Legislature's intent in enacting the statute. Rather than enforcing these unambiguous statutes, as it was required to do (but which would have operated to appellee Stucki's demise), the court instead impermissibly opined what MCL 125.286e *needed to say (or not say)* in order for appellee Stucki to prevail. Simply put, the court "legislated from the bench" in order to assist Stucki, which violates the separation of powers doctrine, and it impermissibly ignored the bedrock rules of statutory construction which this Court has chiseled in stone;

B. The decision directly conflicts with the unanimous, first-impression decision in *Carleton Sportsman's Club v Exeter Twp*, 217 Mich App 195; 550 NW2d 867 (1996), which the court was required to follow, but which it instead decided to ignore, as well as with this Court's unanimous (and likewise first-impression) decision in *Charter Twp of Northville v Northville Public Schools*, 469 Mich 285; 666 NW2d 213 (2003), thereby bringing this case squarely within the grounds enumerated in MCR 7.302(B)(5);

C. The decision renders MCR 1.103, MCR 1.105, MCR 1.201(A), MCR 7.215(B)(1)(2)(3)(7), MCR 7.215(C)(2), and MCR 7.215(J)(I)--plus several other court rules,

with these being the most important ones--surplusage and nugatory also; and (most importantly)

D. The decision abrogates this appellant's property, due process, and equal protection rights as guaranteed to him by the US Constitution (5th & 14th Amendments), as well as the parallel provisions of Mich Const 1963, art I, § 2 & 17, which abrogations would not likely be deemed "harmless or insignificant error" by any prudent, responsible, and law-abiding jurist anywhere in this country, nor by any law-abiding American citizen either.

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10. There is nothing ambiguous about MCL 125.286e (1). It expressly defines what a site plan is ("the documents and drawings required by the zoning ordinance"), and it unambiguously expresses the Legislature's intent in enacting this statute ("to insure that a proposed land use or activity is in compliance with local ordinances and state and federal statutes.") As such, this statute may not be construed but, rather, must be enforced as written. That did not happen in this case. Rather, the appellate court ignored MCL 125.286e (1), which it was not permitted to do. *AFSCME, supra,* at 399-400, citing *Altman, supra* at 635. The identical points and argument can be made with respect to MCL 125.286e (3), which, as demonstrated above, the appellate court also ignored. Not only did the court impermissibly ignore this Court's binding precedents on statutory construction, it also violated the constitution by doing so.[4]

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4 "While it is within the province of the courts to pass upon the validity of statutes and ordinances, courts may not legislate nor undertake to compel legislative bodies to do so one way or another." *Brae Burn, Inc* v *City of Bloomfield Hills,* 350 Mich 425, 431; 86 NW2d 166 (1957), quoting *Northwood Properties Co.* v *Royal Oak City Inspector, 325* Mich 419, 423; 39 NW2d 25 (1949). When, as here, a court legislates by rendering unambiguous statutory mandates surplusage and nugatory →

11. Likewise, there is nothing ambiguous about MCR 1.103, 1.105, 1.201(A), 7.215(C)(2), 7.215(J)(1), and 7.215(B)(1)(2)(3)&(7) either. As such, none of these court rules may be construed. Rather, they must be applied, enforced, and adhered to as written. However, as it did with MCL 125.286e (1)(3), the appellate court ignored these court rules also. [5]

12. Both the US and Michigan Constitutions prohibit the state from depriving any person of life, liberty, or property without due process of law, nor may the state deny to any

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instead of enforcing those statutory mandates as written--which the courts (especially the appellate courts) are required to do--it violates the separation of powers doctrine (Const 1963, art 3, § 2), which was enacted by the people "to preserve the independence of the three branches of government." *In re* 1976 *PA* 267, 400 Mich 660, 662; 255 NW2d 635 (1977). "Where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted." *Soap & Detergent Ass'n v Natural Resources Commission,* 415 Mich 728, 752; 330 NW2d 346 (1982). That is precisely what has occurred in this case, and it is unconscionable that this Court would sit idly by and let it occur.

5 MCR 7.215(B)--which applies exclusively to Court of Appeals decisions (See MCR 1.103)--required the court to publish its decision, because the results described in subsections 1, 2, 3, & 7 of the rule are all extant in the decision in this case. Had the court done so, it would have all but guaranteed appellant a reversal...because the decision in this case clearly conflicts with the decisions in *Carleton, Arthur,* and *Northville, supra*--it violates the separation of powers doctrine in the state constitution--and it flies in the face of all of the other case law decisions and court rules cited above. Rather than publish its decision in this case, as it was required to do, the appellate court instead ignored MCR 7.215(B)(1)(2)(3)&(7), thereby rendering these procedural rules surplusage and nugatory. This Court has exclusive jurisdiction over amendments to the court rules [See MCR 1.201(A)], and it is unexcusable for this Court to sit idly by while an inferior appellate court ignores, negates, and renders those procedural rules surplusage and nugatory at will, as the appellate panel did in this case.

person within its jurisdiction the equal protection of the laws.[6] That is, however, precisely what the appellate court (an arm of the state) has done to this appellant by its decision in this case. And it has done so in the most egregious manner possible, as demonstrated by all of the impermissible actions it took in this case as enumerated above. [7] Nor can Appelle Stucki possibly justify what she seeks to do, when she could easily have done otherwise and been in full compliance with all applicable laws and municipal ordinances. Indeed, Stucki's desire to ignore the law is the epitome of hypocrisy, especially in view of the directly conflicting position she took in a similar matter involving this appellant three years before she sought her own SEUP's. [8]

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6 US Constitution, 5th & 14th Am; Const 1963, art I, § 2 & 17.

7 Appellant's constitutional rights are clearly at stake, because a pig farm is about to be unlawfully established only *80 feet* from his single-family, residentially-zoned master bedroom window, on the directly-abutting (and also single-family, residentially-zoned) property. Appellant doubts that any prudent, responsible, and law-abiding jurist in this country would view the abrogation of his property, due process, and equal protection rights, as described herein, as "harmless or insignificant error" either.

8 Appellee Stucki owns a 34.6 acre parcel of property (over 1.5 million square feet of land), on which she could easily have sited her proposed livestock-keeping uses in full compliance with the zoning ordinance-mandated setback requirements. Had Stucki done so, appellant would have had no valid legal objection either. Instead, Stucki sought (and is being permitted by Comstock Township and the Michigan judicial system) to establish these uses in contravention of the ordinance-mandated setback requirements, several state statutes, and numerous binding case law decisions on these matters that appellant has repeatedly cited throughout this litigation (including those in ¶ 2-11, *supra.)*

Stucki's self-serving position with respect to her own SEUP requests is also a far cry from the position she took in 1992, when this appellant sought a SEUP use from Comstock Township to construct an accessory building and establish a small (6 adult) dog kennel on his own property. By comparison, Stucki's SEUP approvals authorize her to keep

Conclusion

13. Stripped to its essence, the question presented is whether the US Constitution--Michigan's Constitution and statutes--the municipal ordinances--the procedural court rules--and the applicable appellate decisions that are at issue in this case are worth the paper they are printed on. Or, is the "Law in Michigan" whatever a court wants it to be on a given day with respect to Stucki? Based on everything set

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92 head of adult livestock (10 each of pigs, cattle, sheep & goats; 12 horses; 25 fowl of any species; and 15 rabbits, with no limitations whatsoever placed on the number of juveniles of these species that she can also keep.) More importantly, Stucki can keep this entire menagerie of livestock--all of them--***only 80*** feet from appellant's master bedroom window.

As was the case with Stucki's proposed SEUP uses, appellant's dog kennel SEUP use did not--as he proposed to establish it--comply with the ordinance-mandated setback requirements. Appellee Stucki vigorously opposed appellant's proposed use for that very reason, as well as the reason that appellant's proposed use *"would have a major negative impact on the residence immediately to the south of* [and approximately 120 feet from] *the proposed site and, **more importantly, set an unacceptable precedent for undermining both the spirit and the letter of our township zoning laws.**"* (emphasis added) See Ex 3, attached, highlighted portions. Appellant's SEUP requests were denied.

While she may not have recognized it when she made it, Stucki's setback objection was directly on-target. See *Mitchell* v *Grewal*, 338 Mich 81, 89; 61 NW2d 3 (1953) and *Room & Board Homes* v *Detroit Mayor*, 67 Mich App 381, 384; 241 NW2d 216 (1976) (the requirements for a SEUP use must be found in the ordinance, and a SEUP use, unlike a variance, does not involve the varying of those requirements but, rather, strict compliance with the enumerated requirements.) The only way to insure that the ordinance-enumerated requirements (like setbacks) are complied with is to review a site plan before the use is approved - not four years after the use is approved. Appellant's proposed dog-kennel SEUP use was properly denied, just as Stucki's proposed SEUP uses should have been denied too. However, as Stucki, Comstock Township, and the Michigan judicial system apparently see it, the law on these matters is something that can be invoked at will.

forth in this motion, it appears that the law can be ignored with impunity when a court wishes to assist a particular party, or that same law can be rigorously enforced when a court desires to thwart a particular party. No matter how it is viewed, this is not equal justice for all, nor is it fair play. Rather, decisions like those rendered to date in the present case simply intensify disdain for the legal system.

14. This Court's order (Ex 1, attached) denied leave to appeal "because we are not persuaded that the questions presented should be reviewed by this Court." A request for leave to appeal was not, however, appellant's principal request for relief. Rather, it was his alternate request, with his principal request being reversal by either peremptory order or per curiam decision, plus other related relief. See Appellant's Application, p 50, point 2. More importantly, appellant presented only two questions for this Court's review (with five sub-questions encompassed within each principal question.) See Appellant's Application, p xv-xvii. The issues raised above all relate to just the first question that appellant advanced, with the second question not being addressed at all in this motion. It is difficult to comprehend how this Court could not be "persuaded" that appellant's questions--especially his first one, which encompasses overt deprivations of his constitutionally guaranteed property and due process rights by the Court of Appeals--should not be reviewed.

Relief Requested

THEREFORE, appellant respectfully requests that this Court:

1. Grant this motion for reconsideration;

2 Review and grant appellant's application for leave;

3. Reverse, either by peremptory order or per curiam decision, the grant of summary disposition to appellee Stucki; grant summary disposition to appellant instead; and remand to the trial court for further proceedings; and

4. Grant appellant any further relief the Court deems just and equitable.

Dated: November 12, 2004

(signature)
Kenneth A Rathert (P26335)
Attorney for Appellant Gillette

ATTACHMENT TO
SPECIAL EXCEPTION USE PERMIT APPLICATION

MARCIA STUCKI
2088 South 36th Street
Galesburg, Michigan 49053

Applicant purchased her farmstead containing two (2) frame barns and a chicken coop, comprising approximately 24 acres, on May 21, 1976. (Deed and mortgage survey attached) The Sellers, Clay and Ethel Williams, had resided at the property and used it for general farm purposes prior to Ms. Stucki acquiring the land. Immediately after obtaining ownership, Applicant brought horses to the property, which were kept on the property continuously since that time. Shortly thereafter, the Applicant brought poultry to the property. In 1986, Applicant acquired the 10-acre parcel immediately to the north from her parents, Jacob and Naomi Stucki.

The Applicant filed this Application for Special Use Exception to formally establish her right to keep horses/private stables and raise and keep farm animals, such as poultry and goats (emphasis added by Petitioner).

Applicant submits the enclosed diagram depicting the location of the suitable fenced area for horses to confirm that they can be confined to an area which precludes them from approaching nearer than 60 feet to any dwelling on adjacent premises (namely the property of Gary L. Gillette to the south, at 2170 South 36th Street, Galesburg, Michigan 49053). The Gillette residence is approximately 25 feet south of the Applicant's property line. (1973 survey map enclosed.)

This last year, for privacy and benefit of herself and her neighbor, applicant erected a six-foot stockade fence

along her south boundary line. After this time, Applicant allowed her horses to graze up to that new stockade fence on a couple of occasions to help reduce the vegetation. Applicant has since confined the horses within a second fence which lies to the north of the stockade fence, which is shown on the attached diagram as approximately 73 feet from the property line at the nearest point to the Gillette residence. When Applicant's horses are kept within that second fencing, they are much further than 60 feet from the Gillette residence and, in fact, are approximately 98 feet, at the closest point, from the northwesterly corner of the Gillette residence.

At the hearing, Applicant shall have photographs available which will corroborate the nature of the small farm she purchased in 1976, prior to the enactment of the Charter Township of Comstock Zoning Ordinance. The photographs and existing drawings demonstrate that her established use, involving horses and farm animals, does not 1) affect adversely the health and safety of residents in the area, 2) is not detrimental to the use or development of adjacent properties or general neighborhood, and 3) is compatible with the natural environment, all of which factors warrant approval of her special exception use application.

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF KALAMAZOO

GARY L. GILLETTE, D.V.M.,
Petitioner/Appellant,

v

Hon. John F. Foley (P13549)
Circuit Court Judge
File No. B 95-3152-AA

MARCIA V. STUCKI,
Respondent/Appellee,

and

COMSTOCK CHARTER TOWNSHIP,
Respondent/Appellee.

Petition For Injunctive Relief, Damages, And Attorney Fees

[Petitioner's Note: The seven Exhibits that were appended to this Petition have been omitted (most being included elsewhere in this Appendix), and certain other non-substantive changes were also made.]

The petitioner/appellant, Gary L. Gillette, D.V.M., by counsel, requests that this court, pursuant to MCR 3.310(A), grant the petitioner/appellant a preliminary and permanent injunction restraining the respondents/appellees, Marcia V. Stucki and Comstock Charter Township, from establishing, maintaining, or continuing a nuisance per se. In the alternative, the petitioner/appellant requests the court to grant peremptory reversal as per his previously filed motion. The petitioner/appellant also requests a judgment for his

damages, attorney fees, court costs and other relief. As grounds for this petition, the petitioner/appellant states:

Background

1. The petitioner/appellant, Gary L. Gillette, D.V.M., is the owner of certain real property located at 2170 South 36th. Street, Galesburg, Michigan, 49053, in the Charter Township of Comstock, County of Kalamazoo, and State of Michigan.

2. The respondent/appellee, Marcia V. Stucki, is the owner of certain real property located at 2088 South 36th. Street, Galesburg, Michigan, 49053, in the Charter Township of Comstock, County of Kalamazoo, and State of Michigan, which property abuts the petitioner/appellant's property.

3. The respondent/appellee, Comstock Charter Township, is the duly constituted Township in which both of the above-described properties are located and which has constituted, pursuant to Michigan statute, a Planning Commission and a Board of Zoning Appeals.

4. On August 10, 1995, the Comstock Charter Township Planning Commission passed a motion to grant Respondent/Appellee, Marcia V. Stucki's, request for a Special Exception Use Permit, pursuant to the Comstock Charter Township Zoning Ordinance, Section 10.03.m, to allow the keeping on the respondent/appellee's property of a private stable consisting of no more than 12 horses.

No Site Plan

5. Even though a private stable of horses has been maintained on Respondent/Appellee Stucki's property continuously since the day this Special Exception Use

Approval was granted (August 10, 1995), a Site Plan for that use has yet to be submitted, reviewed and an approval for the same granted. As specified below, the lack of a site plan submission, review and approval is a flagrant violation of state statute [MCL 125.286e; MSA 5.2963 (16e)] and local ordinance (Comstock Charter Township Zoning Ordinance, Article 22.00, Section 22.01 *et. seq.*).

6. On October 12, 1995, the Comstock Charter Township Planning Commission passed a motion to grant Respondent/Appellee, Marcia V. Stucki's, request for a Special Exception Use Permit, pursuant to the Comstock Charter Township Zoning Ordinance, Section 10.03.q., to allow the keeping on the respondent/appellee's property of:

1. 25 adult poultry;
2. 15 adult rabbits;
3. ten adult swine;
4. ten adult goats;
5. ten adult sheep; and
6. ten adult cattle.

with no restrictions on the numbers of offspring of these species.

Site Plan Requirement Overlooked And Setbacks Changed Without Authority

7. In that same motion, the Planning Commission purported to establish setbacks for the housing of these animals of 60 feet to any property line and 100 feet to any dwelling, as well as 60 feet to any dwelling on adjacent property for purposes of their general encroachment.

8. As more specifically set forth below, the Planning Commission has absolutely no authority to establish setback

dimensions other than as provided in the Township Zoning Ordinance Section 4.11.1. ANIMALS, A & D, a copy of which is attached as Exhibit A.

9. The Planning Commission had no authority to waive the Site Plan Review requirements mandated by MCL 125.286e; MSA 5.2963(16e) and the Comstock Charter Township Zoning Ordinance, Sections 22.01 and 22.01.2 c., a copy of which is attached as Exhibit B, for either of the Special Exception Use approvals which it granted to Respondent/Appellee Stucki.

10. In light of the statutory and zoning ordinance mandates for site plan submission, review and approval prior to the creation of any use pursuant to a Special Exception Use grant, the Planning Commission had no authority to permit Respondent/Appellee Stucki to immediately create and then continue such uses. Yet, Stucki has created and continued such uses for over twelve months in the case of the private stable, and for over ten months for the other species.

11. The Comstock Charter Township Zoning Ordinances, Section 10.03 USES PERMITTED ONLY BY SPECIAL EXCEPTION, a copy of which is attached as Exhibit C, defines what special exceptions the Planning Commission is permitted to grant in Respondent/Appellee Stucki's zoning district as follows:

> *Subject to the provisions of Section 4.11.1,* the raising and keeping of animals which either are or whose products are customarily used for human consumption. Such use shall be subject to the following restrictions.
>
> 1. This provision shall apply only to poultry, swine, goats, sheep, rabbits and cattle.

2. The raising and keeping of such animals shall not be conducted on a lot of less than five acres in size.

3. That the raising and keeping of such livestock shall be used primarily for the use or consumption by the occupants of such premises and shall not be raised primarily for profit.

Comstock Charter Township Ordinance, Section 10.03.q. (emphasis added).

12. Poultry, swine, goats, sheep, rabbits and cattle are animals which either are or whose products are customarily used for human consumption.

13. The setback provisions of Comstock Charter Township Zoning Ordinance, Sections 4.11.1 A & D, and the Zoning Ordinance, Section 10.03.q. provide the following setback requirements for the respondent/appellee, Stucki's, proposed uses:

A. For the grazing of livestock: A rectangular area encompassing 50 feet (Sec. 4.11.1.A) + 100 feet (Sec. 4.11.1.D) = 150 feet in lateral distance + 300 feet in depth from the front abutting property line. (See Exhibit D)

B. For the housing of livestock: A rectangular area encompassing 150 feet (Sec. 4.11.1.A) + 100 feet (Sec. 4.11.1.D) = 250 feet in lateral distance + 300 feet in depth from the front abutting property line. (See Exhibit D)

C. For the keeping of poultry, wild fowl or rabbits: A rectangular area encompassing 100 feet (Sec. 4.11.1.A) + 100 feet (Sec. 4.11.1 D) = 200 feet in lateral distance + 300 feet in depth from the front abutting property line. (See Exhibit D)

14. Exhibit D is a fair and accurate representation of the distances between the properties and structures in question.

15. Exhibit D is a fair and accurate representation of the rectangular setbacks areas required for the various uses proposed by Respondent/Appellee, Stucki.

16. As shown by Exhibit D, all of the buildings suitable for housing the animals lie within the petitioner/appellant's setback area as prescribed by Ordinance Sections 4.11.1.A & D.

17. Several of the buildings shown in Exhibit D have regularly been used to house some of the animals in the ten-plus months since Respondent/Appellee Stucki's Special Exception Use was approved.

18. As shown by Exhibit D, a large proportion of the pasture (which has regularly been used to graze and/or keep animals since the use was approved over ten months ago) also lies within the petitioner/appellant's setback area for these uses.

19. The relevant portion of the Comstock Charter Township Zoning Ordinance, attached as Exhibit B, states:

Section 22.01; SCOPE: ....

> Prior to the issuance of a building permit, *to the creation of a use* or the erection of a building in the district and under the conditions cited below, *a site plan shall be submitted* in accordance with this Article to the Planning Commission for approval. *Site plans shall be required* for the following uses and related development to be created in the following districts ....
>
> Section 22.01.2: FOR SPECIAL EXCEPTION USES IN: ....
>
> c) Single-Family Residential Districts.

Comstock Charter Township Zoning Ordinance, Article 22.00, Section 22.01 *et. seq.* (emphasis added).

20. Respondent / Appellee Stucki's and Petitioner / Appellant Gillette's abutting properties are both zoned RI-A, Single Family Residential. Accordingly, the provisions of Zoning Ordinance Sections 22.01 and 22.01.2 cited directly above apply.

21. Site Plan Review for Special Exception Uses is also mandated by statute:

> ". . . Site plan submission, review, and approval shall be required for special uses and planned unit developments."

MCL 125.286e; MSA 5.2963 (16e) (emphasis added).

22. A Site Plan for the two Special Exception Uses granted to Stucki has never been submitted, reviewed, or approved. (Respondent/Appellee, Marcia V. Stucki, admitted this on page 5 of Responses of Marcia V. Stucki to

Petitioner/Appellant Gary L. Gillette, D.V.M.'s Motion for Peremptory Reversal. [Exhibit E attached hereto]. The respondent/appellee has further admitted that the keeping of horses and chickens nonetheless continues on the property. Likewise, Respondent/Appellee, Comstock Charter Township, admitted this same fact on pages 6 & 7 of its responsive pleading to petitioner/appellant's Motion For Peremptory Reversal. [Exhibit F attached hereto]. The respondent-appellee further admitted, on page 7, that the keeping of horses and chickens nonetheless continues on the property.)

Nuisance Per Se

23. Uses of land in violation of local ordinances are a nuisance per se and, pursuant to MCL 125.294; MSA 5.2963(24), the court shall order nuisances per se abated.

24. The Comstock Township Zoning Ordinance, Section 29.03 VIOLATION-PENALTY, Exhibit G attached hereto, contains a similar provision, which reads in relevant part as follows:

> Uses of land...in violation of any provision of this Ordinance are hereby declared to be a nuisance per se. The Court may order such nuisance abated, and the owner and/or agent in charge...may be adjudged guilty of maintaining a nuisance per se, and same may be abated by order of any court of competent jurisdiction.

Injunction Needed To Abate Nuisance Per Se

25. Because of the above-mentioned violations of the statutes and ordinance, the petitioner/appellant is entitled to have the nuisance per se abated and its continuance perpetually enjoined.

26. Petitioner/Appellant has repeatedly requested the respondents/appellees to refrain from establishing, maintaining, or continuing the above-mentioned nuisance per se, but such requests have been to no avail.

27. Because the respondents/appellees are threatening to establish, maintain or continue a nuisance per se or have established, maintained or continued a nuisance per se, the petitioner/appellant is not required to show the existence of a nuisance in fact and is not required to show irreparable harm resulting from the maintenance of the nuisance. *High v Cascade Hills*, 173 Mich App 622; 434 NW 2d 199 (1988). See also *Independence Twp v Skibowski*, 136 Mich App 178; 355 NW 2d 903 (1984); *Indian Village Assn v Shreve*, 52 Mich App 35; 216 NW 2d 447 (1974).

28. If the respondents/appellees are not restrained from establishing, maintaining or continuing the above-mentioned nuisance per se, the petitioner/appellant will suffer irreparable harm and will not have an adequate remedy at law.

29. It is an abuse of discretion for this court, to refuse to enjoin the respondent/appellee Stucki's nuisance per se as specified above. *Farmington Twp, Oakland County v Scott*, 374 Mich 536; 132 NW 2d 607 (1965).

Damages And Attorney Fees

30. The petitioner/appellant has suffered damages because of the above-mentioned nuisance per se and because of the threat of its establishment, maintenance, and continuance.

31. The petitioner/appellant has incurred substantial attorney fees in having to act as a private attorney general (or

city attorney, if you will) and having to seek enforcement of clear state and local law.

Relief Requested

THEREFORE, the petitioner/appellant, by counsel, requests that this court:

A. Grant the petitioner/appellant a preliminary and permanent injunction enjoining Respondents/Appellees from establishing, maintaining or continuing a nuisance per se as specified above and from exercising its Special Exception Uses without first obtaining a site plan review and approval and without complying with the applicable setback requirements;

B. Grant the petitioner/appellant preliminary and a permanent injunction enjoining the respondents/appellees from establishing, maintaining or continuing the special exception use of poultry, rabbits, swine, goats, sheep, and cattle within 300 feet of the respondent/appellee, Marcia V. Stucki's front property line, and within 100 feet of the plaintiff/appellant Gary L. Gillette, D.V.M.'s, home;

C. In the alternative, grant the petitioner/appellant peremptory reversal as he previously requested;

D. Grant the petitioner/appellant a judgment for his damages;

E. Order that the respondents/appellees pay the petitioner/appellant's reasonable attorney fees and court costs; and

F. Grant the petitioner/appellant any further relief that this court deems just and equitable.

THE ABOVE STATEMENTS ARE TRUE TO THE BEST OF MY INFORMATION, KNOWLEDGE, AND BELIEF.

Dated: August 29, 1996

(signature)
Gary L. Gillette, D.V.M.
Petitioner/Appellant

STATE OF MICHIGAN)
) ss.
COUNTY OF KALAMAZOO)

Subscribed and sworn to before me by Gary L. Gillette, D.V.M. this 29th day of August, 1996.

(signature of Linda A. Schubel)
Notary Public, Kalamazoo County, Michigan
My Commission expires: 6-16-99

(signature)
Kenneth A. Rathert (P26335)
Attorney for Petitioner/Appellant

Service of this document was made today upon all parties or their attorneys of record by delivery or mail under MCR 2.107(C). I declare that the above statement about service is true to the best of my information, knowledge and belief.

Dated: 8-29-96

(signature)
Linda A. Schubel

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF KALAMAZOO

GARY L. GILLETTE, D.V.M.,
Petitioner/Appellant,

v

Hon. John F. Foley (P13549)
File No. B 95-3152-AA

MARCIA V. STUCKI,
Respondent/Appellee,
and

COMTOCK CHARTER TOWNSHIP
PLANNING COMMISSION and
COMSTOCK CHARTER TOWNSHIP
ZONING BOARD OF APPEALS,
Respondents/Appellees.

Respondent Marcia V. Stucki's Response To Gary L. Gillette, D.V.M.'s Petition For Injunctive Relief, Damages And Attorney Fees

---

The Respondent/Appellee, Marcia V. Stucki, by counsel, Garry L. Walton, P.C., responds to the Petition for Injunctive Relief, Damages and Attorney Fees as follows:

Background

1. Admitted

2. Admitted

3. Admitted

4. Admitted

No Site Plan

5. Admitted that no site plan has yet been submitted, reviewed and approved. Denied as untrue that the simultaneous lack of a site plan submission, review and approval violates of Statute as ordinance. [sic]

6. Admitted.

Site Plan Requirement Overlooked and Set Back Changed Without Authority

7. Admitted.

8. Denied for the reason that the allegations are untrue.

9. Denied for the reason that the allegations are untrue. By way of further answer Respondent states the site plan review requirement was not waived, but rather Site Plan Review was not required at that stage of the proceedings.

10. Denied for the reason that the allegations are untrue. By way of further answer Respondent Stucki was authorized to maintain existing uses.

11. Admitted that a portion of the Comstock Charter Township Zoning Ordinances is attached and quoted.

12. Admitted.

13. Denied for the reason that the allegations are untrue. By way of further answer the Comstock Charter Township Zoning Ordinance provisions speak for themselves. By way

of further response the setback requirements are subject to restrictions and exclusions contained in Section 4.11.1 (B) of the Zoning Ordinance.

14. Denied for the reason that the allegations are untrue.

15. Denied for the reason that the allegations are untrue.

16. Denied for the reason that the allegations are untrue.

17. Admitted.

18. Denied for the reason that the allegations are untrue.

19. Admitted that a portion of the Zoning Ordinance is quoted.

20. Admitted that Respondent/Appellee Stucki's property is presently zoned R1-A Single Family Residential. Respondent/Appellee denies as untrue the implication or inference that her property was so zoned at the time she acquired the property and began housing animals.

21. Allegations in paragraph 21 constitute legal conclusions which require no answer. Respondent/Appellee, Stucki, denies as untrue any implication or inference that a lack of contemporaneous site plan violated the Statute.

22. Admitted that a Site Plan has not yet been submitted, reviewed or approved and that Stucki continues the keeping of horses and chickens.

Nuisance Per Se

23. Denied for the reason that the allegations are untrue. By way of further answer the allegations in paragraph 23

constitute legal conclusions which no answer is required. [sic] Respondent/Appellee denies as untrue that she has violated Local Ordinances or created a nuisance per se.

24. Admitted that a portion of the Zoning Ordinance is quoted. By way of further answer Respondent/Appellee, Stucki, denies she has violated any Ordinance.

Injunction Needed to Abate Nuisance Per Se

25. Denied for the reason that the allegations are untrue.

26. Denied for the reason that the allegations are untrue.

27. Denied for the reason that the allegations are untrue. By way of further answer Respondent/Appellee states the allegations contain legal conclusions which require no response.

28. Denied for the reason that the allegations are untrue.

29. Denied for the reason that the allegations are untrue. By way of further answer Respondent/Appellee states that paragraph 29 contains legal conclusions which require no response.

Damages and Attorney Fees

30. Denied for the reason that the allegations are untrue.

31. Denied for the reason that the allegations are untrue.

Affirmative Defenses

1. Petitioner/Appellant fails to state a claim upon which relief may be granted.

2. Petitioner/Appellant failed to file his claim before the claim was barred by the applicable Statute of Limitations.

3. Plaintiff is guilty of laches and has not acted in a timely and reasonable manner.

4. Plaintiff has failed to mitigate his damages.

5. Plaintiff's own negligence was a proximate cause of any damages incurred.

6. Plaintiff has failed to exhaust his administrative remedies.

7. Respondent assumes the right to add additional affirmative defenses through the time allowed for discovery.

WHEREFORE, Respondent/Appellee, Marcia V. Stucki, requests this Honorable Court dismiss the Petition or award no damages to Petitioner/Appellant and award Respondent/Appellee, Marcia V. Stucki, her actual costs and attorney fees incurred in responding to this Petition.

Dated: May 20, 1998

(signature)
Garry L. Walton (P31199)
Attorney for Appellee Stucki

Service of a copy of this document was made this date upon all parties who have appeared or their attorney of record by delivery of mail pursuant to MCR 2.107(C). I declare that the statements above are true to the best of my information, knowledge and belief.

Dated: [left blank]

(signature)
Trudy L. Newmeyer

Rathert Law Offices, P. C.
Attorneys at Law
137 N. Park St.
Kalamazoo, MI 49007-3728
TEL. (269) 349-6808
FAX (269) 349-1517

November 12, 2004 **HAND DELIVERED**

Court Clerk
Michigan Supreme Court
Hall of Justice Building
925 West Ottawa Street
Lansing, MI 48909-7522

Re: **Gillette v Stucki**
Supreme Court No. 126021
Court of Appeals No. 240199
9th Circuit Court No. 95-3152-AA

Dear Clerk:

Enclosed for filing in the above-captioned case are the following documents:

- An original and seven copies of Appellant's Motion For Reconsideration Of Order Denying Leave To Appeal;

- A Notice of Hearing;

- An Affidavit In Support Of Appellant's Motion For Reconsideration Of Order Denying Leave To Appeal; and

- A Proof of Service for all the above.

The person hand-delivering these documents will pay the required motion filing fee.

If you need any further information, please let me know.

Sincerely,

(signature)

Kenneth A. Rathert
Attorney for Appellant

cc: Garry L. Walton, Attorney for Appellee Stucki;
Gary L. Gillette

BY FAX TO 616-382-2040 AND HAND DELIVERY ON OCTOBER 12, 1995

October 11, 1995

Mr. Kenneth C. Sparks
Bauckham, Sparks, Rolfe & Thomsen, P.C.
Attorneys at Law
500 Park Building
132 West South Street
Kalamazoo, Michigan 49007

Re: Objection to the October 3, 1995 Comstock Township ZBA Meeting Minutes Concerning Deliberations On The Marcia Stucki Special Exception Use Permit Application.

Dear Mr. Sparks:

Yesterday, I obtained from the Comstock Township Office a copy of the preliminary minutes from the October 3, 1995 meeting of the Comstock Township ZBA and, after reading the portions pertaining to the issues surrounding the Marcia Stucki Special Exception Use Permit Application, I was both shocked and dismayed. Accordingly, I hereby officially **OBJECT** to these minutes and I request that my **OBJECTION**, as elaborated upon more fully below, be made a part of the record on the Marcia Stucki Special Exception Use Permit Application.

With regard to the referenced ZBA meeting minutes, inaccuracies abound concerning what was actually stated by a number of persons speaking on the issues when compared to what was recorded in the minutes. More importantly, however, the ***OMISSION***

from those minutes of certain crucial facts, statements and responses to questions from this opponent to others on the underlying issues...some of which appear to have been purposefully omitted...***taints*** the entire record. I could have made similar comments and objections as concerns the minutes of the July 27, 1995 Planning Commission Meeting but I elected not to do so. If it becomes necessary, I will make my reasons for that decision known at a later date.

I base my position concerning the ZBA events of October 3 on a review of the content of the minutes compared to the content of the videotape recordings I have made of the Marcia Stucki Special Exception Use Permit Application proceedings. As Rodney King demonstrated rather vividly to the Los Angeles Police Department a few years ago, a video camera captures ***everything***....both visual and auditory....at which it is pointed. And because it is merely a machine, a video camera is completely impartial in what it captures; it lacks the ability to be arbitrary and capricious as we humans sometimes are or can become.

I am also deeply troubled because the minutes of the referenced meetings have been prepared by yourself, based upon notes which you have taken during the meetings. I suspect the Circuit Court, if an Appeal becomes necessary, will be as much or perhaps more disturbed than I am about the numerous irregularities which have occurred in this entire matter, including those related to the completeness and accuracy of the record.

In my opinion, your taking of the meeting notes and preparation of the meeting minutes on behalf of the designated Planning Commission and ZBA secretaries constitutes a procedural error in and of itself. Furthermore,

this activity compromises and deters from your responsibility to pay attention to what is going on during the meeting in order to assure that a fair and impartial hearing is conducted. I do not believe that a fair and impartial hearing has occured in these proceedings thus far.

Given the above, I believe that, for the balance of the Stucki Special Exception Use Permit Application process, some significant changes need to be made concerning the issues raised herein. I leave you people to decide what changes will be necessary to safeguard the rights of the respective parties in this dispute.

In addition, I request that you abstain from the very obvious (as documented on the videotape) "leading" and/or "steering" tactics you have employed with both the Planning Commission and ZBA members over the course of these proceedings.

Finally, I request that both you and the Planning Commission state your intentions with regard to the above issues...for and on the record...at the Planning Commission meeting on the Stucki Application scheduled for tomorrow night, October 12, 1995.

Sincerely,

(signature)

Gary L. Gillette, D.V.M.

cc. Planning Commission Members Gazdag, Shields, Watts, Jones, Heidanus, Klooster, Betz & Hudson; plus ZBA Members Doud, Haase, Marley, Wetherbee & Ritchie [all of the above via hand delivery to the Township office on 10/11/95]

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF KALAMAZOO

GARY L. GILLETTE, D.V.M.,
Petitioner,

Hon. Philip D. Schaefer
File No. D 95-3152-AA

v

MARCIA V. STUCKI,
Respondent.

PROOF OF SERVICE

On the 4th day of November, 1999, I personally served, or served by first class mail, copies of the following documents and items:

- Petitioner's Motion For Summary Disposition;
- Petitioner's Brief In Support Of Motion For Summary Disposition, including ten (10) appended Exhibits;
- A "Goat-Bellowing" Audio Cassette Tape Recording;
- Praecipe; and
- This Proof Of Service

on Garry L. Walton, attorney for Respondent Stucki, by hand delivery or by placing these documents and items in a sealed envelope, with first class postage fully prepaid, addressed to Mr. Walton at his business address as listed above, and depositing the envelope and its contents in the United States mail. MCR 2.107(C).

Dated: 11-4-99

(signature)
Cheryl Petty

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF KALAMAZOO

GARY L. GILLETTE, D.V.M.,
Petitioner/Appellant

Hon. Philip D. Schaefer

File No. D 00-0138-AA

v

CHARTER TOWNSHIP OF
COMSTOCK PLANNING
COMMISSION,
Respondent/Appellee.

Notice Of Dismissal

PLEASE TAKE NOTICE that the Petitioner / Appellant in the above-captioned action, by counsel and pursuant to MCR 2.504(A)(1)(a), hereby dismisses this appeal, without prejudice.

PLEASE TAKE FURTHER NOTICE that the within-referenced dismissal does not in any way affect, or apply to, *Gary L. Gillette, D.V.M. v Comstock Township*, a Michigan Charter Township, Kalamazoo County Circuit Court File No. D 00-0135-CZ, nor to *Gary L. Gillette, D.V.M. v Marcia V. Stucki*, Kalamazoo County Circuit Court File No. D 95-3152-AA.

Dated: March 26, 2001

(signature)
Kenneth A. Rathert (P26335)
Attorney for Petitioner

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF KALAMAZOO

GARY L. GILLETTE, D.V.M.,
Plaintiff,

Hon. Philip D. Schaefer
File No. D 95-3152-AA

v

MARCIA V. STUCKI,
Defendant.

Plaintiff's Amended Motion For Summary Disposition

The Plaintiff (Gillette), by counsel, pursuant to MCR 2.116(C)(10), moves the Court for summary disposition on his Petition For Injunctive Relief, Damages and Attorney Fees. As grounds for this motion, Gillette states:

1. There is no genuine issue of material fact that--pursuant to the Township Rural Zoning Act (TRZA), which has been incorporated verbatim in Comstock Township's Zoning Ordinance--site plan submission, review, and approval was mandatory **BEFORE** the Planning Commission could lawfully grant final approval for Defendant Stucki's special exception use permit requests in 1995. Nor is there a genuine issue of material fact that Stucki failed to comply with the Act's site plan requirements.

2. By failing to comply with the statutory site plan requirements before creating her unlawfully approved special exception uses, Stucki's existing uses are

statutory and ordinance-defined per se nuisances that the court is required to abate.

3. Stucki is estopped from asserting the inconsistent and frivolous "site plan defenses" she has repeatedly raised in this case.

4. This motion is based on:

- the Record of the underlying appeal;
- Gillette's Petition For Injunctive Relief, Damages and Attorney Fees and Stucki's responses to that petition;
- the Exhibits appended to Gillette's Brief In Support Of His Amended Motion For Summary Disposition;
- the "goat-bellowing" tape recording submitted with Gillette's original Motion For Summary Disposition in this case;
- the relevant portions of the Township Rural Zoning Act and the Comstock Township Zoning Ordinance;
- Gillette's Affidavit In Support Of His Amended Motion For Summary Disposition; and
- well-settled case law on the issues presented, including nuisance per se.

Importantly, this case law includes *Charter Township of Oshtemo v Central Advertising Co*, 125 Mich App 538; 336 NW2d 823 (1983); lv den 419 Mich 882 (1984), which:

- arose and was tried in this court before the Honorable C.H. Mullen;

- was prosecuted by the law firm in which his Honor was a partner before becoming a circuit court judge; and

- involved the identical issues being litigated in the case at bar, i.e., the requirement for site plan submission, review, and approval before receiving approval for, and before creating, a land use requiring the same; the statutory and ordinance-defined nuisance per se that arises when those requirements are not met; and the requirement for a court to abate completely and permanently such use of land.

THEREFORE, Gillette requests that this Court:

A. Enter an Order reversing the SEUP grants Stucki received, and abating the per se nuisances [horses/chickens] that currently exist on Stucki's property;

B. Enter an Order permanently enjoining Stucki, and any future owner of Stucki's property, from establishing, re-establishing, and/or maintaining a private stable and "other livestock" uses on the property, including all species of poultry, rabbits, swine, goats, sheep, and cattle.

C. Find that Stucki's "site plan defenses" are without merit and frivolous;

D. Grant Gillette an evidentiary hearing to establish his damages;

E. Order that Stucki pay Gillette's reasonable attorney fees, court costs, and other expenses incurred in prosecuting this action; and

F. Grant Gillette any further relief that this Court deems just and equitable.

Dated: April 26, 2001

(signature)
Kenneth A. Rathert (P26335)
Attorney for Plaintiff

STATE OF MICHIGAN
IN THE COURT OF APPEALS

GARY L. GILLETTE, D.V.M., Appellant/Petitioner,	Court of Appeals Docket No. 240199
v	9th Circuit Court File No. 95-3152-AA
MARCIA V. STUCKI, Appellee/Respondent.	

APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

[Petitioner's Note: Only the Questions For Review (including the trial court's and the appellant's answer to each question, as required by Michigan's appellate rules)--which are listed on pages xv-xvii in the original of this Brief--have been reproduced below.]

1. **Can the ultimate questions in this appeal, i.e., whether summary disposition was correctly granted to Stucki, and correctly denied to appellant, properly be decided unless this court first decides which of the diametrically opposed trial court decisions on the dispositive issue in this case was correct--and several related issues?**

   The trial court did not answer this question. Rather, its decision created the question.

   Appellant answers "no."

2. **Does resolution of the diametrically opposed trial court decisions on the dispositive issue in this case turn on the standards for circuit court review of special exception use decisions, and whether those standards were correctly applied (and adhered to) by each judge that decided this issue?**

The trial court failed to answer this question. Rather, its decision created the question.

Appellant answers "yes."

3. **Is there a genuine issue of material fact of whether, pursuant to the Township Rural Zoning Act, which has been incorporated verbatim in Comstock Township's zoning ordinance, site plan submission, review, and approval was mandatory <u>before</u> the Planning Commission could lawfully grant final approval for Stucki's special exception use permit requests?**

The trial court failed to answer this question. Rather, it decided that the law does not impose requirements for prior or even contemporaneous approval of a site plan where a special land use is contemplated.

Appellant answers "no."

4. **Is judicial construction of unambiguous statutes permissible?**

The trial court failed to answer this question.

Appellant answers "no."

5. **Do reported cases of this court, which Stucki has repeatedly failed to rebut, and which the trial court erroneously applied, set forth why these unambiguous statutory site plan requirements exist?**

The trial court failed to answer this question. Rather, it believes the case in question supports its view of the law.

Appellant answers "yes."

6. **Is there is a genuine issue of material fact that Stucki's SEUP requests were granted final approval in violation of the site plan provisions of the Township's zoning ordinance, as well as the provisions of MCL 125.286e?**

The trial court failed to answer this question. Rather, it erroneously decided that the law does not impose requirements for prior or even contemporaneous approval of a site plan where a special land use is contemplated, which apparently renders the site plan requirements of both the statute and the Township's zoning ordinance surplusage in its view.

Appellant answers "no."

7. **By failing to comply with the statutory site plan requirements before creating her unlawfully-approved SEUP uses, are Stucki's existing uses**

statutory and ordinance-defined per se nuisances that the trial court was required to abate?

The trial court failed to answer this question. Rather, it erroneously decided that the law does not impose requirements for prior or even contemporaneous approval of a site plan where a special land use is contemplated, which apparently renders the site plan requirements of both the statute and the Township's zoning ordinance surplusage in its view.

Appellant answers "yes."

8. **While he was not required to demonstrate that Stucki's livestock-keeping uses are or were a nuisance in fact, did appellant nonetheless do so?**

The trial court failed to answer this question.

Appellant answers "yes."

9. **Is *Charter Township of Oshtemo v Central Advertising Co*, 125 Mich App 538; 336 NW2d 823 (1983), controlling authority for the relief the trial court should have granted--but which it refused to grant?**

The trial court faied to answer this question, or to address this case.

Appellant answers "yes."

10. **Is Stucki estopped, as a matter of law, from asserting the inconsistent and wholly frivolous "site plan defenses" she has repeatedly proffered in this case?**

The trial court failed to answer this question.

Appellant answers "yes."

11. **Are Judge Schaefer's factual findings concerning Stucki's "claimed" nonconforming use right clearly erroneous, and were these findings also irrelevant to the factual and legal issues raised for a decision, as well as irrelevant to the only legal question that he actually decided in this case?**

Judge Schaefer failed to answer this question. Rather, his actions created the question.

Appellant answers "yes."

***

Dated: August 29, 2002 (signature)

Kenneth A. Rathert (P26335)
Attorney for Appellant

STATE OF MICHIGAN
IN THE COURT OF APPEALS

GARY L. GILLETTE, D.V.M.,
Appellant/Petitioner,

v

MARCIA V. STUCKI,
Appellee/Respondent,

and

COMSTOCK CHARTER TOWNSHIP PLANNING COMMISSION and COMSTOCK CHARTER TOWNSHIP ZONING BOARD OF APPEALS,
Appellees/Respondents.

Court of Appeals
Docket No. 208923

9th Circuit Court
File No. B 95-3152-AA

Appellant's Application For Leave To Appeal And Brief In Support Of Motion For Peremptory Reversal (Oral Argument Requested)

[Petitioner's Note: Only the relevant portions of the Table of Contents in this Application have been reproduced below]

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III. The Circuit Court Clearly Erred In Holding That The ZBA Had Authority To Exempt Stucki's Proposed Farm Animal SEUP Use From The Ordinance-Mandated Setback Requirements "By Interpretation" And That The Planning Commission Could Thereafter Create Entirely New Setback Restrictions 32-42

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IV. The Circuit Court Abused Its Discretion By Refusing To Grant Appellant's Delayed Petition For Review On The Private Stable SEUP Approval And/Or By Refusing To Declare The Entire Proceedings Below *void ab initio* 42-48

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***

Dated: January 13, 1998

(signature)
Kenneth A. Rathert
Attorney for Appellant

STATE OF MICHIGAN
IN THE COURT OF APPEALS

GARY L. GILLETTE, D.V.M.,
Appellant/Petitioner,

v

MARCIA V. STUCKI,
Appellee/Respondent,

and

COMSTOCK CHARTER TOWNSHIP PLANNING COMMISSION and COMSTOCK CHARTER TOWNSHIP ZONING BOARD OF APPEALS,
Appellees/Respondents.

Court of Appeals
Docket No. 208923

9th Circuit Court
File No. B 95-3152-AA

Appellant's Motion For Peremptory Reversal

The Appellant/Petitioner, by counsel and pursuant to MCR 7.211(C)(4), moves the Court for Peremptory Reversal of the judgment entered by the 9th Circuit Court in this matter on December 23, 1997, on the grounds that reversible error is so manifest that an immediate reversal of the judgment entered should be granted without further formal argument or submission.

Complete reasons are more fully set forth in **Appellant's Application For Leave To Appeal And Brief In Support Of Motion For Peremptory Reversal**, filed simultaneously with this motion.

Relief Requested

Appellant/Petitioner requests that this Court:

A. Issue an order peremptorily reversing the Circuit Court's December 23, 1997 judgment;

B. Remand this matter to the Circuit Court with instructions to:

1. Enter an injunction abating the livestock-keeping *nuisance per se* on Appellee Stucki's property;

2. Enter a permanent injunction enjoining Appellee Stucki from establishing, re-establishing, maintaining, or continuing the keeping of horses, cattle, swine, goats, sheep, rabbits and all species of poultry on her property; and

3. Grant the Appellant/Petitioner a jury trial to establish his damages.

C. Grant the Appellant/Petitioner costs of these proceedings; and

D. Grant Appellant/Petitioner any further relief that this Court deems just and equitable.

Dated: January 13, 1998

(signature)
Kenneth A. Rathert
Attorney for Appellant

Stucki's Arguments Regarding MCL 125.286e (Pages 24-25 of her Brief On Appeal In The Court Of Appeals – all punctuation, spelling and grammar as in the original)

The Township Rural Zoning Act does not require that site plan submission, review, and approval before authorization of a proposed special land use.

MCLA 125.286 (e) provides:

(2) "A township *may require* the submission and approval of a site plan *before authorization* of a land use or activity regulated by a zoning ordinance. The zoning ordinance shall specify the body, board, or official charged with reviewing site plan and granting approval." (Emphasis added).

(3) "If a zoning ordinance requires site plan approval, the site plan, as approved, shall become part of the record of approval, and subsequent actions relating to the activity authorized shall be consistent with the approved site plan..."

(4) "The procedures and requirements for the submission and approval of site plans shall be specified in the zoning ordinance. Site plan submission, review, and approval shall be required for special land uses and planned unit developments."

(5) "A site plan shall be approved if it contains information required by the zoning ordinance *and is in compliance with the zoning ordinance and the conditions imposed pursuant to the ordinance, other township planning documents,* other

applicable ordinances, and state and federal statutes." (Emphasis added).

The word "may" in a statute is construed as permissive rather than mandatory. *Newport West Condominium Association v Veniar,* 134 Mich App 1,12, 350 NW2d 818 (1984); *Tobin v Michigan Civil Service Commission,* 416 Mich 661, 667, 331, NW 2d 184 (1982). Sub-section 2, read in conjunction with Sub-section 4, means that, while a Township may or may not require activity review, site plan submission, and approval is required for special land uses and planned unit development review. Sub-section 2 addresses not the timing of site plan submission and approval, but rather whether site plan submission and approval is ever required for a particular use or activity.

The language in Sub-section 5, supports site plan submission, review, and approval occurring after authorization of the proposed use. Sub-section 5 states that a site plan shall be approved if it contains the information required by the Zoning Ordinance (for example, the requirements contained in Section 22.02 of the Comstock Township Zoning Ordinance), and is in compliance with the Zoning Ordinance (such as applicable setbacks) and the conditions imposed pursuant to the ordinance (Section 4.13(b) allowed the Planning Commission to impose conditions, such as numbers of animals, species, fencing, locations). Section 16e(5) contemplates that a site plan would incorporate conditions imposed pursuant to special exception use review.

March 22, 1992

To the Comstock Township Planning Commission:

This letter is in regard to the application of Gary L. Gillette for two Special Exception Use Permits (SEUPs) to allow a structure which, in fact, would not conform to current zoning regulations in the following four ways: (1) would exceed allowable square footage; (2) would be located in front of the residence; (3) would not meet minimum setback requirements for the intended use; and (4) would be used to house more than three adult dogs (i.e., as a kennel).

As I stated at the public hearing on March 12, it would be to my personal advantage to have the current kennel (which is less than 50 feet from my southern property line) replaced by one at the proposed site (which would be farther away from my property).

However, after having reviewed the zoning principles involved, as well as having considered the impact of the proposed structure on the neighbor to the immediate south of the applicant's property, I have concluded that I cannot support the approval of these SEUPs. To approve these SEUPs would have a major negative impact on the residence immediately to the south of the proposed site, and, more importantly, set an unacceptable precedent for undermining both the spirit and the letter of our township zoning laws.

Therefore, as one of the two closest neighbors to the site in question I am most respectfully requesting that you reject both SEUPs at your next meeting.

Thank you for the opportunity to comment on this issue.

Sincerely,

Marcia V. Stucki
2088 South 36th St.
Galesburg, MI 49053